Calendar No. 301

104TH CONGRESS, *2d Session* | SENATE | REPORT 104–239

THE OMNIBUS PROPERTY RIGHTS ACT OF 1995—S. 605

MARCH 1, 1996.—Ordered to be printed

Mr. HATCH, from the Committee on the Judiciary, submitted the following

REPORT

together with

SUPPLEMENTAL, ADDITIONAL, AND MINORITY VIEWS

[To accompany S. 605]

The Committee on the Judiciary, to which was referred the bill (S. 605) to establish a uniform and more efficient Federal process for protecting property owners' rights guaranteed by the fifth amendment, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

CONTENTS

The amendment is as follows:

29–010

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Omnibus Property Rights Act of 1995".

TITLE I—FINDINGS AND PURPOSES

SEC. 101. FINDINGS.

The Congress finds that—

(1) the private ownership of property is essential to a free society and is an integral part of the American tradition of liberty and limited government;

(2) the framers of the United States Constitution, in order to protect private property and liberty, devised a framework of Government designed to diffuse power and limit Government;

(3) to further ensure the protection of private property, the fifth amendment to the United States Constitution was ratified to prevent the taking of private property by the Federal Government, except for public use and with just compensation;

(4) the purpose of the takings clause of the fifth amendment of the United States Constitution, as the Supreme Court stated in Armstrong v. United States, 364 U.S. 40, 49 (1960), is "to bar Government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole";

(5) the Federal Government has singled out property holders to shoulder the cost that should be borne by the public, in violation of the just compensation requirement of the takings clause of the fifth amendment of the United States Constitution;

(6) there is a need both to restrain the Federal Government in its overzealous regulation of the private sector and to protect private property, which is a fundamental right of the American people; and

(7) the incremental, fact-specific approach that courts now are required to employ in the absence of adequate statutory language to vindicate property rights under the fifth amendment of the United States Constitution has been ineffective and costly and there is a need for Congress to clarify the law and provide an effective remedy.

SEC. 102. PURPOSE.

The purpose of this Act is to encourage, support, and promote the private ownership of property by ensuring the constitutional and legal protection of private property by the United States Government by—

(1) the establishment of a new Federal judicial claim through which to vindicate and protect property rights;

(2) the simplification and clarification of court jurisdiction over property right claims;

(3) the establishment of an administrative procedure that requires the Federal Government to assess the impact of government action on holders of private property;

(4) the minimization, to the greatest extent possible, of the taking of private property by the Federal Government and to ensure that just compensation is paid by the Government for any taking; and

(5) the establishment of administrative compensation procedures involving the enforcement of the Endangered Species Act of 1973 and section 404 of the Federal Water Pollution Control Act.

TITLE II—PROPERTY RIGHTS LITIGATION RELIEF

SEC. 201. FINDINGS.

The Congress finds that—

(1) property rights have been abrogated by the application of laws, regulations, and other actions by the Federal Government that adversely affect the value of private property;

(2) certain provisions of sections 1346 and 1402 and chapter 91 of title 28, United States Code (commonly known as the Tucker Act), that delineate the jurisdiction of courts hearing property rights claims, complicates the ability of a

property owner to vindicate a property owner's right to just compensation for a governmental action that has caused a physical or regulatory taking;

(3) current law—

(A) forces a property owner to elect between equitable relief in the district court and monetary relief (the value of the property taken) in the United States Court of Federal Claims;

(B) is used to urge dismissal in the district court on the ground that the plaintiff should seek just compensation in the Court of Federal Claims; and

(C) is used to urge dismissal in the Court of Federal Claims on the ground that plaintiff should seek equitable relief in district court;

(4) property owners cannot fully vindicate property rights in one court;

(5) property owners should be able to fully recover for a taking of their private property in one court;

(6) certain provisions of sections 1346 and 1402 and chapter 91 of title 28, United States Code (commonly known as the Tucker Act) should be amended, giving both the district courts of the United States and the Court of Federal Claims jurisdiction to hear all claims relating to property rights; and

(7) section 1500 of title 28, United States Code, which denies the Court of Federal Claims jurisdiction to entertain a suit which is pending in another court and made by the same plaintiff, should be repealed.

SEC. 202. PURPOSES.

The purposes of the title are to—

(1) establish a clear, uniform, and efficient judicial process whereby aggrieved property owners can obtain vindication of property rights guaranteed by the fifth amendment to the United States Constitution and this Act;

(2) amend the Tucker Act, including the repeal of section 1500 of title 28, United States Code;

(3) rectify the constitutional imbalance between the Federal Government and the States; and

(4) require the Federal Government to compensate property owners for the deprivation of property rights that result from State agencies' enforcement of federally mandated programs.

SEC. 203. DEFINITIONS.

For purposes of this title the term—

(1) "agency" means a department, agency, independent agency, or instrumentality of the United States, including any military department, Government corporation, Government-controlled corporation, or other establishment in the executive branch of the United States Government;

(2) "agency action" means any action, inaction, or decision taken by an agency or State agency that at the time of such action, inaction, or decision adversely affects private property rights;

(3) "just compensation"—

(A) means compensation equal to the full extent of a property owner's loss, including the fair market value of the private property taken, whether the taking is by physical occupation or through regulation, exaction, or other means; and

(B) shall include compounded interest calculated from the date of the taking until the date the United States tenders payment;

(4) "owner" means the owner or possessor of property or rights in property at the time the taking occurs, including when—

(A) the statute, regulation, rule, order, guideline, policy, or action is passed or promulgated; or

(B) the permit, license, authorization, or governmental permission is denied or suspended;

(5) "private property" or "property" means all property protected under the fifth amendment to the United States Constitution, any applicable Federal or State law, or this Act, and includes—

(A) real property, whether vested or unvested, including—

(i) estates in fee, life estates, estates for years, or otherwise;

(ii) inchoate interests in real property such as remainders and future interests;

(iii) personalty that is affixed to or appurtenant to real property;

(iv) easements;

(v) leaseholds;

(vi) recorded liens; and

(vii) contracts or other security interests in, or related to, real property;

(B) the right to use water or the right to receive water, including any recorded lines on such water right;

(C) rents, issues, and profits of land, including minerals, timber, fodder, crops, oil and gas, coal, or geothermal energy;

(D) property rights provided by, or memorialized in, a contract, except that such rights shall not be construed under this title to prevent the United States from prohibiting the formation of contracts deemed to harm the public welfare or to prevent the execution of contracts for—

(i) national security reasons; or

(ii) exigencies that present immediate or reasonably foreseeable threats or injuries to life or property;

(E) any interest defined as property under State law; or

(F) any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest;

(6) "State agency" means any State department, agency, political subdivision, or instrumentality that—

(A) carries out or enforces a regulatory program required under Federal law;

(B) is delegated administrative or substantive responsibility under a Federal regulatory program; or

(C) receives Federal funds in connection with a regulatory program established by a State,

if the State enforcement of the regulatory program, or the receipt of Federal funds in connection with a regulatory program established by a State, is directly related to the taking of private property seeking to be vindicated under this Act; and

(7) "taking of private property", "taking", or "take"—

(A) means any action whereby private property is the object of that action and is taken so as to require compensation under the fifth amendment to the United States Constitution or under this Act, including by physical invasion, regulation, exaction, condition, or other means; and

(B) shall not include—

(i) a condemnation action filed by the United States in an applicable court; or

(ii) an action filed by the United States relating to criminal forfeiture.

SEC. 204. COMPENSATION FOR TAKEN PROPERTY.

(a) IN GENERAL.—No agency or State agency, shall take private property except for public use and with just compensation to the property owner. A property owner shall receive just compensation if—

(1) as a consequence of an action of any agency, or State agency, private property (whether all or in part) has been physically invaded or otherwise taken without the consent of the owner; and

(2)(A) such action does not substantially advance the stated governmental interest to be achieved by the legislation or regulation on which the action is based;

(B) such action exacts or affects the owner's constitutional or otherwise lawful right to use the property or a portion of such property as a condition for the granting of a permit, license, variance, or any other agency action without a rough proportionality between the stated need for the required dedication and the impact of the proposed use of the property;

(C) such action results in the property owner being deprived, either temporarily or permanently, of all or substantially all economically beneficial or productive use of the property or that part of the property affected by the action without a showing that such deprivation inheres in the title itself;

(D) such action diminishes the fair market value of the property or the affected portion of the property which is the subject of the action by 33 percent or more with respect to the value immediately prior to the governmental action; or

(E) under any other circumstance where a taking has occurred within the meaning of the fifth amendment of the United States Constitution.

(b) NO CLAIM AGAINST STATE OR STATE INSTRUMENTALITY.—No action may be filed under this section against a State agency for carrying out the functions described under section 203(6). Claims arising from the action, inaction, or decision of a State agency are properly filed against the Federal agency which administers the relevant Federal program.

(c) BURDEN OF PROOF.—(1) The Government shall bear the burden of proof in any action described under—

(A) subsection (a)(2)(A), with regard to showing the nexus between the stated governmental purpose of the governmental interest and the impact on the proposed use of private property;

(B) subsection (a)(2)(B), with regard to showing the proportionality between the exaction or affect and the impact of the proposed use of the property; and

(C) subsection (a)(2)(C), with regard to showing that such deprivation of value inheres in the title to the property.

(2) The property owner shall have the burden of proof in any action described under subsection (a)(2)(D), with regard to establishing the diminution of value of property.

(d) COMPENSATION AND NUISANCE EXCEPTION TO PAYMENT OF JUST COMPENSATION.—(1) No compensation shall be required by this Act if the owner's use or proposed use of the property is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the State in which the property is situated. To bar an award of damages under this Act, the United States shall have the burden of proof to establish that the use or proposed use of the property is a nuisance.

(2)(A) Subject to paragraph (1), if an agency action directly takes property or a portion of property under subsection (a), compensation to the owner of the property that is affected by the action shall be either the greater of an amount equal to the difference between—

(i) the fair market value of the property or the affected portion of the property before such property or the affected portion of such property became the object of the agency action; and

(ii) the fair market value of the property or the affected portion of the property when such property or the affected portion of such property becomes subject to the agency action.

(B) Where appropriate, the calculation of fair market value shall include business losses.

(e) TRANSFER OF PROPERTY INTEREST.—The United States shall take title to the property interest for which the United States pays a claim under this Act.

(f) SOURCE OF COMPENSATION.—Awards of compensation referred to in this section, whether by judgment, settlement, or administrative action, shall be promptly paid by the agency out of currently available appropriations supporting the activities giving rise to the claims for compensation. If the agency action resulted from a requirement imposed by another agency, the agency making the payment or satisfying the judgment may seek partial or complete reimbursement from the appropriated funds of the other agency. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year of promptly seek additional appropriations for such purpose.

SEC. 205. JURISDICTION AND JUDICIAL REVIEW.

(a) IN GENERAL.—A property owner may file a civil action under this Act to challenge the validity of any agency action that adversely affects the owner's interest in private property in either the United States District Court or the United States Court of Federal Claims. This section constitutes express waiver of the sovereign immunity of the United States. Notwithstanding any other provision of law and notwithstanding the issues involved, the relief sought, or the amount in controversy, each court shall have concurrent jurisdiction over both claims for monetary relief and claims seeking invalidation of any Act of Congress or any regulation of an agency as defined under this Act affecting private property rights. The plaintiff shall have the election of the court in which to file a claim for relief.

(b) APPEALS.—In any appeal resulting from a claim under this section, the United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from a final decision of a district court of the United States, the United States District Court of Guam, the United States District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, if the jurisdiction of that court was based, in whole or in part, on subsection (a); and

(2) of an appeal from a final decision of the United States Court of Federal Claims if that jurisdiction was based, in whole or in part, on subsection (a).

(c) STANDING.—Persons adversely affected by an agency action taken under this Act shall have standing to challenge and seek judicial review of that action.

(d) AMENDMENTS TO TITLE 28, UNITED STATES CODE.—(1) Section 1491(a) of title 28, United States Code, is amended—

(A) in paragraph (1) by amending the first sentence to read as follows: "The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States for monetary relief founded either upon the Constitution or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, in cases not sounding in tort, or for invalidation of any Act of Congress or any regulation of an executive department that adversely affects private property rights in violation of the fifth amendment of the United States Constitution";

(B) in paragraph (2) by inserting before the first sentence the following: "In any case within its jurisdiction, the Court of Federal Claims shall have the power to grant injunctive and declaratory relief when appropriate."; and

(C) by adding at the end thereof the following new paragraphs:

"(4) In cases otherwise within its jurisdiction, the Court of Federal Claims shall also have supplemental jurisdiction, concurrent with the courts designated in section 1346(b) of this title, to render judgment upon any related tort claim authorized under section 2674 of this title.

"(5) In proceedings within the jurisdiction of the Court of Federal Claims which constitute judicial review of agency action (rather than de novo proceedings), the provisions of section 706 of title 5 shall apply.".

(2)(A) Section 1500 of title 28, United States Code, is repealed.

(B) The table of sections for chapter 91 of title 28, United States Code, is amended by striking out the item relating to section 1500.

SEC. 206. STATUTE OF LIMITATIONS.

The statute of limitation for actions brought under this title shall be 6 years from the date of the taking of private property.

SEC. 207. ATTORNEYS' FEES AND COSTS.

The court, in issuing any final order in any action brought under this title, shall award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing plaintiff.

SEC. 208. RULES OF CONSTRUCTION.

Nothing in this title shall be construed to interfere with the authority of any State to create additional property rights.

SEC. 209. EFFECTIVE DATE.

The provisions of this title and amendments made by this title shall take effect on the date of the enactment of this Act and shall apply to any agency action that occurs after such date.

TITLE III—ALTERNATIVE DISPUTE RESOLUTION

SEC. 301. ALTERNATIVE DISPUTE RESOLUTION.

(a) IN GENERAL.—Either party to a dispute over a taking of private property as defined under title II of this Act or litigation commenced under such title may elect to resolve the dispute through settlement or arbitration. In the administration of this section—

(1) such alternative dispute resolution may only be effectuated by the consent of all parties;

(2) arbitration procedures shall be in accordance with the alternative dispute resolution procedures established by the American Arbitration Association; and

(3) in no event shall arbitration be a condition precedent or an administrative procedure to be exhausted before the filing of a civil action under this Act.

(b) COMPENSATION AS A RESULT OF ARBITRATION.—The amount of arbitration awards shall be paid from the responsible agency's currently available appropriations supporting the agency's activities giving rise to the claim for compensation. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

(c) REVIEW OF ARBITRATION.—(1) Appeal from arbitration decisions shall be to the United States District Court or the United States Court of Federal Claims in the manner prescribed by law for the claim under this Act.

(2) The provisions of title 9, United States Code (relating to arbitration), shall apply to enforcement of awards rendered under this section.

(d) PAYMENT OF CERTAIN COMPENSATION.—In any appeal under subsection (c), the amount of the award of compensation shall be promptly paid by the agency from

appropriations supporting the activities giving rise to the claim for compensation currently available at the time of final action on the appeal. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

TITLE IV—PRIVATE PROPERTY TAKING IMPACT ANALYSIS

SEC. 401. PURPOSES.

The purposes of this title are—

(1) to protect the health, safety, welfare, and rights of the public; and

(2) to the extent practicable, avoid takings of private property by assessing the effect of government action on private property rights.

SEC. 402. DEFINITIONS.

For purposes of this title the term—

(1) "agency" means an agency as defined under section 203 of this Act, but shall not include the General Accounting Office;

(2) "rule" has the same meaning as such term is defined under section 551(4) of title 5, United States Code; and

(3) "taking of private property" has the same meaning as such term is defined under section 203 of this Act.

SEC. 403. PRIVATE PROPERTY TAKING IMPACT ANALYSIS.

(a) IN GENERAL.—(1) The Congress authorizes and directs that, to the fullest extent possible—

(A) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies under this title; and

(B) subject to paragraph (2), all agencies of the Federal Government shall complete a private property taking impact analysis before issuing or promulgating any policy, regulation, proposed legislation, or related agency action which is likely to result in a taking of private property.

(2) The provisions of paragraph (1)(B) shall not apply to—

(A) an action in which the power of eminent domain is formally exercised;

(B) an action taken—

(i) with respect to property held in trust by the United States; or

(ii) in preparation for, or in connection with, treaty negotiations with foreign nations;

(C) a law enforcement action, including seizure, for a violation of law, of property for forfeiture, or as evidence in a criminal proceeding;

(D) a study or similar effort or planning activity;

(E) a communication between an agency and a State or local land-use planning agency concerning a planned or proposed State or local activity that regulates private property; regardless of whether the communication is initiated by an agency or is undertaken in response to an invitation by the State or local authority;

(F) the placement of a military facility or a military activity involving the use of solely Federal property;

(G) any military or foreign affairs function (including a procurement function under a military or foreign affairs function), but not including the civil works program of the Army Corps of Engineers; and

(H) any case in which there is an immediate threat to health or safety that constitutes an emergency requiring immediate response or the issuance of a regulation under section 553(b)(B) of title 5, United States Code, if the taking impact analysis is completed after the emergency action is carried out or the regulation is published.

(3) A private property taking impact analysis shall be a written statement that includes—

(A) the specific purpose of the policy, regulation, proposal, recommendation, or related agency action;

(B) an assessment of the likelihood that a taking of private property will occur under such policy, regulation, proposal, recommendation, or related agency action;

(C) an evaluation of whether such policy, regulation, proposal, recommendation, or related agency action is likely to require compensation to private property owners;

(D) alternatives to the policy, regulation, proposal, recommendation, or related agency action that would achieve the intended purposes of the agency action and lessen the likelihood that a taking of private property will occur; and

(E) an estimate of the potential liability of the Federal Government if the Government is required to compensate a private property owner.

(4) Each agency shall provide an analysis required under this section as part of any submission otherwise required to be made to the Office of Management and Budget in conjunction with a proposed regulation.

(b) GUIDANCE AND REPORTING REQUIREMENTS.—(1) The Attorney General of the United States shall provide legal guidance in a timely manner, in response to a request by an agency, to assist the agency in complying with this section.

(2) No later than 1 year after the date of enactment of this Act and at the end of each 1-year period thereafter, each agency shall submit a report to the Director of the Office of Management and Budget and the Attorney General of the United States identifying each agency action that has resulted in the preparation of a taking impact analysis, the filing of a taking claim, or an award of compensation under the just compensation clause of the fifth amendment of the United States Constitution. The Director of the Office of Management and Budget and the Attorney General of the United States shall publish in the Federal Register, on an annual basis, a compilation of the reports of all agencies submitted under this paragraph.

(c) PUBLIC AVAILABILITY OF ANALYSIS.—An agency shall—

(1) make each private property taking impact analysis available to the public; and

(2) to the greatest extent practicable, transmit a copy of such analysis to the owner or any other person with a property right or interest in the affected property.

(d) PRESUMPTIONS IN PROCEEDINGS.—For the purpose of any agency action or administrative or judicial proceeding, there shall be a rebuttable presumption that the costs, values, and estimates in any private property takings impact analysis shall be outdated and inaccurate, if—

(1) such analysis was completed 5 years or more before the date of such action or proceeding; and

(2) such costs, values, or estimates have not been modified within the 5-year period preceding the date of such action or proceeding.

SEC. 404. DECISIONAL CRITERIA AND AGENCY COMPLIANCE.

(a) IN GENERAL.—No final rule shall be promulgated if enforcement of the rule could reasonably be construed to require an uncompensated taking of private property as defined by this Act.

(b) COMPLIANCE.—In order to meet the purposes of this title as expressed in section 401, all agencies shall—

(1) review, and where appropriate, re-promulgate all regulations that result in takings of private property under this Act, and reduce such takings of private property to the maximum extent possible within existing statutory requirements;

(2) prepare and submit their budget requests consistent with the purposes of this title as expressed in section 401 for fiscal year 1997 and all fiscal years thereafter; and

(3) within 120 days of the effective date of this section, submit to the appropriate authorizing and appropriating committees of the Congress a detailed list of statutory changes that are necessary to meet fully the purposes of section 401, along with a statement prioritizing such amendments and an explanation of the agency's reasons for such prioritization.

SEC. 405. RULES OF CONSTRUCTION.

Nothing in this title shall be construed to—

(1) limit any right or remedy, constitute a condition precedent or a requirement to exhaust administrative remedies, or bar any claim of any person relating to such person's property under any other law, including claims made under this Act, section 1346 or 1402 of title 28, United States Code, or chapter 91 of title 28, United States Code; or

(2) constitute a conclusive determination of—

(A) the value of any property for purposes of an appraisal for the acquisition of property, or for the determination of damages; or

(B) any other material issue.

SEC. 406. STATUTE OF LIMITATIONS.

No action may be filed in a court of the United States to enforce the provisions of this title on or after the date occurring 6 years after the date of the submission

of the applicable private property taking impact analysis to the Office of Management and Budget.

TITLE V—PRIVATE PROPERTY OWNERS ADMINISTRATIVE BILL OF RIGHTS

SEC. 501. FINDINGS AND PURPOSE.

(a) FINDINGS.—The Congress finds that—

(1) a number of Federal environmental programs, specifically programs administered under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344), have been implemented by employees, agents, and representatives of the Federal Government in a manner that deprives private property owners of the use and control of property;

(2) as Federal programs are proposed that would limit and restrict the use of private property to provide habitat for plant and animal species, the rights of private property owners must be recognized and respected;

(3) private property owners are being forced by Federal policy to resort to extensive, lengthy, and expensive litigation to protect certain basic civil rights guaranteed by the United States Constitution;

(4) many private property owners do not have the financial resources or the extensive commitment of time to proceed in litigation against the Federal Government;

(5) a clear Federal policy is needed to guide and direct Federal agencies with respect to the implementation of environmental laws that directly impact private property;

(6) all private property owners should and are required to comply with current nuisance laws and should not use property in a manner that harms their neighbors;

(7) nuisance laws have traditionally been enacted, implemented, and enforced at the State and local level where such laws are best able to protect the rights of all private party owners and local citizens; and

(8) traditional pollution control laws are intended to protect the general public's health and physical welfare, and current habitat protection programs are intended to protect the welfare of plant and animal species.

(b) PURPOSES.—The purposes of this title are to—

(1) provide a consistent Federal policy to encourage, support, and promote the private ownership of property; and

(2) to establish an administrative process and remedy to ensure that the constitutional and legal rights of private property owners are protected by the Federal Government and Federal employees, agents, and representatives.

SEC. 502. DEFINITIONS.

For purposes of this title the term—

(1) "the Acts" means the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) and section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344);

(2) "agency head" means the Secretary or Administrator with jurisdiction or authority to take a final agency action under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.) or section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344).

(3) "non-Federal person" means a person other than an officer, employee, agent, department, or instrumentality of—

(A) the Federal Government; or

(B) a foreign government;

(4) "private property owner" means a non-Federal person (other than an officer, employee, agent, department, or instrumentality of a State, municipality, or political subdivision of a State, acting in an official capacity or a State, municipality, or sub-division of a State) that—

(A) owns property referred to under paragraph (5)(A) or (B); or

(B) holds property referred to under paragraph (5)(C);

(5) "property" means—

(A) land;

(B) any interest in land; and

(C) the right to use or the right to receive water; and

(6) "qualified agency action" means an agency action (as that term is defined in section 551(13) of title 5, United States Code) that is taken—

(A) under section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344); or

(B) under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

SEC. 503. PROTECTION OF PRIVATE PROPERTY RIGHTS.

(a) IN GENERAL.—In implementing and enforcing the Acts, each agency head shall—

(1) comply with applicable State and tribal government laws, including laws relating to private property rights and privacy; and

(2) administer and implement the Acts in a manner that has the least impact on private property owners' constitutional and other legal rights.

(b) FINAL DECISIONS.—Each agency head shall develop and implement rules and regulations for ensuring that the constitutional and other legal rights of private property owners are protected when the agency head makes, or participates with other agencies in the making of, any final decision that restricts the use of private property in administering and implementing this Act.

SEC. 504. PROPERTY OWNER CONSENT FOR ENTRY.

(a) IN GENERAL.—An agency head may not enter privately owned property to collect information regarding the property, unless the private property owner has—

(1) consented in writing to that entry;

(2) after providing that consent, been provided notice of that entry; and

(3) been notified that any raw data collected from the property shall be made available at no cost, if requested by the private property owner.

(b) NONAPPLICATION.—Subsection (a) does not prohibit entry onto property for the purpose of obtaining consent or providing notice required under subsection (a).

SEC. 505. RIGHT TO REVIEW AND DISPUTE DATA COLLECTED FROM PRIVATE PROPERTY.

An agency head may not use data that is collected on privately owned property to implement or enforce the Acts, unless—

(1) the agency head has provided to the private property owner—

(A) access to the information;

(B) a detailed description of the manner in which the information was collected, and

(C) an opportunity to dispute the accuracy of the information; and

(2) the agency head has determined that the information is accurate, if the private property owner disputes the accuracy of the information under paragraph (1)(C).

SEC. 506. RIGHT TO AN ADMINISTRATIVE APPEAL OF WETLANDS DECISIONS.

Section 404 of the Federal Water Pollution Control Act (33 U.S.C. 1344) is amended by adding at the end of the following new subsection:

"(u) ADMINISTRATIVE APPEALS.—

"(1) The Secretary or Administrator shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an administrative appeal of the following actions under this section:

"(A) A determination of regulatory jurisdiction over a particular parcel of property.

"(B) The denial of a permit.

"(C) The terms and conditions of a permit.

"(D) The imposition of an administrative penalty.

"(E) The imposition of an order requiring the private property owner to restore or otherwise alter the property.

"(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the property involved in the action.

"(3) An owner of private property may receive compensation, if appropriate, subject to the provisions of section 508 of the Omnibus Property Rights Act of 1995.".

SEC. 507. RIGHT TO ADMINISTRATIVE APPEAL UNDER THE ENDANGERED SPECIES ACT OF 1973.

Section 11 of the Endangered Species Act of 1973 (16 U.S.C. 1540) is amended by adding at the end the following new subsection:

"(i) ADMINISTRATIVE APPEALS.—

"(1) The Secretary shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their au-

thorized representatives an opportunity for an administrative appeal of the following actions:

"(A) A determination that a particular parcel of property is critical habitat of a listed species.

"(B) The denial of a permit for an incidental take.

"(C) The terms and conditions of an incidental take permit.

"(D) The finding of jeopardy in any consultation on an agency action affecting a particular parcel of property under section 7(a)(2) or any reasonable and prudent alternative resulting from such finding.

"(E) Any incidental 'take' statement, and any reasonable and prudent measures included therein, issued in any consultation affecting a particular parcel of property under section 7(a)(2).

"(F) The imposition of an administrative penalty.

"(G) The imposition of an order prohibiting or substantially limiting the use of the property.

"(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the parcel of property involved in the action.

"(3) An owner of private property may receive compensation, if appropriate, subject to the provisions of section 508 of the Omnibus Property Rights Act of 1995.".

SEC. 508. COMPENSATION FOR TAKING OF PRIVATE PROPERTY.

(a) ELIGIBILITY.—A private property owner that, as a consequence of a final qualified agency action of an agency head, is deprived of 33 percent or more of the fair market value of the affected portion of the property as determined by a qualified appraisal expert, is entitled to receive compensation in accordance with the standards set forth in section 204 of this Act.

(b) TIME LIMITATION FOR COMPENSATION REQUEST.—No later than 90 days after receipt of a final decision of an agency head that deprives a private property owner of fair market value or viable use of property for which compensation is required under subsection (a), the private property owner may submit in writing a request to the agency head for compensation in accordance with subsection (c).

(c) OFFER OF AGENCY HEAD.—No later than 180 days after the receipt of a request for compensation, the agency head shall provide to the private property owner, where appropriate under the standards of this Act—

(1) an offer to purchase the affected property of the private property owner at a fair market value assuming no use restrictions under the Acts; and

(2) an offer to compensate the private property owner for the difference between the fair market value of the property without those restrictions and the fair market value of the property with those restrictions.

(d) PRIVATE PROPERTY OWNER'S RESPONSE.—(1) No later than 60 days after the date of receipt of the agency head's offers under subsection (c) (1) and (2) the private property owner shall accept one of the offers or reject both offers.

(2) If the private property owner rejects both offers, the private property owner may submit the matter for arbitration to an arbitrator appointed by the agency head from a list of arbitrators submitted to the agency head by the American Arbitration Association. The arbitration shall be conducted in accordance with the real estate valuation arbitration rules of that association. For purposes of this section, an arbitration is binding on—

(A) the agency head and a private property owner as to the amount, if any, of compensation owed to the private property owner; and

(B) whether the private property owner has been deprived of fair market value or viable use of property for which compensation is required under subsection (a).

(e) PAYMENT.—An agency head shall pay a private property owner any compensation required under the terms of an offer of the agency head that is accepted by the private property owner in accordance with subsection (d), or under a decision of an arbitrator under that subsection, out of currently available appropriations supporting the activities giving rise to the claim for compensation. The agency head shall pay to the extent of available funds any compensation under this section not later than 60 days after the date of the acceptance or the date of the issuance of the decision, respectively. If insufficient funds are available to the agency in the fiscal year in which the award becomes final, the agency shall either pay the award from appropriations available in the next fiscal year or promptly seek additional appropriations for such purpose.

(f) TYPE OF PAYMENT.—At the election of the property owner, payment under this section shall be provided for in accordance with the standard set forth in section 204(d)(2) or in the amount equal to the fair market value of the property before the date of the final qualified agency action with respect to which the property or interest is acquired.

SEC. 509. PRIVATE PROPERTY OWNER PARTICIPATION IN COOPERATIVE AGREEMENTS.

Section 6 of the Endangered Species Act of 1973 (16 U.S.C. 1535) is amended by adding at the end the following new subsection:

"(j) Notwithstanding any other provision of this section, when the Secretary enters into a management agreement under subsection (b) with any non-Federal person that establishes restrictions on the use of property, the Secretary shall notify all private property owners or lessees of the property that is subject to the management agreement and shall provide an opportunity for each private property owner or lessee to participate in the management agreement.".

SEC. 510. ELECTION OF REMEDIES.

Nothing in this title shall be construed to—

(1) deny any person the right, as a condition precedent or as a requirement to exhaust administrative remedies, to proceed under title II or III of this Act;

(2) bar any claim of any person relating to such person's property under any other law, including claims made under section 1346 or 1402 of title 28, United States Code, or chapter 91 of title 28, United States Code; or

(3) constitute a conclusive determination of—

(A) the value of property for purposes of an appraisal for the acquisition of property, or for the determination of damages; or

(B) any other material issue.

TITLE VI—MISCELLANEOUS

SEC. 601. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act, the amendments made by this Act, and the application of the provisions of such to any person or circumstance shall not be affected thereby.

SEC. 602. EFFECTIVE DATE.

Except as otherwise provided in this Act, the provisions of this Act shall take effect on the date of enactment and shall apply to any agency action of the United States Government after such date.

I. LEGISLATIVE HISTORY

S. 605 was introduced into the 104th Congress by Senate Republican Leader Robert Dole on March 23, 1995. Thirty-one Senators joined Senator Dole as original cosponsors: Senators Hatch, Heflin, Lott, Gramm, Brown, Craig, Shelby, Nickles, Kyl, Abraham, Thurmond, Inhofe, Packwood, Warner, Coats, Burns, Thomas, Pressler, Hutchison, Hatfield, Grams, Frist, McConnell, Ashcroft, Mack, Murkowski, Bennett, Kempthorne, Grassley, Bond, and Stevens. Subsequently, three Senators joined as cosponsors: Senators Simpson, Cochrane, and Faircloth. The bill was referred to the Committee on the Judiciary.

The Judiciary Committee held 3 days of hearings on S. 605. The first hearing was held in Washington, DC, on April 6, 1995. The Committee heard testimony from Senator Phil Gramm of Texas; Mrs. Nellie Edwards, a property owner from Provo, UT; Associate Attorney General John R. Schmidt; the Honorable Loren A. Smith, chief judge of the U.S. Court of Federal Claims; Mr. Raymond Ludwiszewski, former general counsel to the Environmental Protection Agency; Mrs. Nancie Marzulla, president of the Defenders of Property Rights; Mr. Roger Marzulla, a partner with the law

firm of Akin, Gump, Strauss, Hauer & Feld; Prof. Carol Rose of Yale Law School; and Mr. John Chaconas, a property owner from St. Amant, LA. The second hearing was held on July 3, 1995, in Salt Lake City, UT. The Committee heard testimony from Mrs. Nellie Edwards, a property owner from Provo, UT; Mr. Larry Gardner, a property owner from St. George, UT; Mr. Edward D. Smith, a property owner from Centerville, UT; Mr. Ken Ashby, president of the Utah Farm Bureau; Mr. Ronald W. Thompson, district manager of the Washington County Water Conservancy District; and Prof. Richard G. Wilkins of Brigham Young University Law School. The third hearing was held on October 18, 1995, in Washington, DC. The Committee heard testimony from Senator John H. Chafee of Rhode Island; Senator Patrick J. Leahy of Vermont; Senator Richard C. Shelby of Alabama; Mr. Keith Eckel, president of the Pennsylvania Farm Bureau; Ms. Merrily Pierce, second vice president of the Fairfax County Federation of Citizens Association; Mr. Joseph L. Sax, counselor to the Secretary of the Interior; Mr. Jonathan H. Adler, director of Environmental Studies for the Competitive Enterprise Institute; and Prof. Richard G. Wilkins of Brigham Young University Law School.

On December 21, 1995, a motion to favorably report S. 605 was approved 10–7 by the Judiciary Committee.

II. THE NEED FOR S. 605

The Founding Fathers considered an individual's right to private property of such significance that they enshrined it in the Bill of Rights. In its final clause, the fifth amendment declares, "[N]or shall private property be taken for public use, without just compensation."[1] Private property is considered to be one of the fundamental building blocks of democracy and capitalism, and political philosophers have deemed its protection to be one of the primary aims of civil society. As John Locke wrote, "The great and chief end therefore, [of people] uniting into Commonwealths, and putting themselves under Government, is the preservation of their property."[2] The Framers of the Constitution accepted this truth. As James Madison, the father of the Constitution and the author of the Takings Clause, wrote in The Federalist No. 54, "[Government] is instituted no less for protection of the property, than of the persons of individuals."[3]

But the rise of the bureaucratic administrative state has led to the deterioration of the Constitution's protection of private property. The 20th Century has witnessed an explosion of Federal regulation of society that has imposed restrictions on property ownership and, consequently, has curtailed individual liberty. Recent estimates place the cost of Federal regulation at approximately $600 billion a year.[4] These costs have come at the expense of the owners of private property, many of whom are individuals of modest means.

---

[1] U.S. Constitutional amendment V.

[2] John Locke, Second Treatise of Government § 124 (Richard H. Cox, ed., Harlan Davidson 1982)(1698).

[3] The Federalist No. 54, at 402 (James Madison)(The Franklin Library, ed., 1984).

[4] *See* Thomas D. Hopkins, Costs of Regulation: Filling the Gaps (August 1992)(report prepared for Reg. Info. Service Center).

For instance, under the authority of statutes such as the Endangered Species Act and the Clean Water Act, Federal agencies have placed numerous restrictions on the ability of private property owners to use their land. For example, Mrs. Nellie Edwards was the owner of 36 acres of prime land that was seized by the city of Provo, UT, last year for an airport expansion project. Mrs. Edwards received only $21,500 for her land, which was well below the expected market value of the land because, unbeknownst to her, the Army Corps of Engineers had arbitrarily classified part of her land as a wetland—even though an investigator saw absolutely no water or wildlife. Numerous similar stories abound. In several cases, Federal agencies have forbidden property owners from putting their land to any economically beneficial use at all. In many of these cases, the injured property owners never received compensation, but instead had to suffer their losses for the benefit of society. As Justice Holmes put it, the public and the courts were "in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."[5]

Mr. Larry Gardner of St. George, UT, testified before the Committee concerning his uncompensated taking. He owns land that was declared a critical habitat of the endangered desert tortoise, in spite of the fact that during a walk-through of the land only a very few signs of tortoises could be found. The result of this declaration has been a precipitous drop in the market value of the property. Mr. Gardner has no objection to protecting endangered species, he merely wishes to arrange a deal acceptable to all. In that spirit, he proposed to the Bureau of Land Management that he would exchange his land for other land that was not critical habitat. However, the BLM only would give him land which was equal in value to his land *after* the designation. In short, the bureaucrats were unwilling to make a deal that did not deprive Mr. Smith of the large majority of the value of his land.

Mr. Ed Smith of Centerville, UT, also testified before the Committee about a taking. He purchased a plot of land pursuant to a planned development in the 1970's. He was concerned about regulations, but was assured several times that the land he bought was not subject to land-use regulations. Indeed, he was even advised by the Army Corps of Engineers that his land was not a wetland, based on a 1982 report. However, in 1993 he was cited for filling a wetland. As his neighbors developed their land, his land took runoff water in the spring. The result is that Mr. Smith is being prohibited from using his property because it has puddles in the springtime.

Springfield City, UT, developed an industrial park with financial aid from the Federal Economic Development Administration. During this development it was necessary to relocate a stream. The Corps of Engineers has declared that the old stream bed is a protected wetland and has refused to consider the new stream a replacement for the old stream. Thus, Springfield City is caught between one Federal agency prohibiting development and another helping to pay for it.

---

[5] *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 416 (1922).

The Heritage Arts Foundation, a nonprofit organization, tried to build the Tuacahn School and Performing Arts Center near the City of Ivins, UT. After more than 1 year, two endangered desert tortoises were found on the access road to the construction site. The access road was not owned by the Foundation. The Fish and Wildlife Service temporarily shut down the construction, a very costly delay, and the Foundation was fined $20,000. In addition, the Foundation is required to distribute flyers about the tortoises to all users of the road, install a special fence along the road, and hire people to do nothing but walk up and down the road looking for tortoises. If any tortoise is found, the Foundation will have to shut down again and contact the Fish and Wildlife Service.

Mr. Harry Bowles bought land in a Texas subdivision. The only possible use for the land was residential, like the many lots around it, and indeed Mr. Bowles bought it to build his retirement home. The legal restrictions of the subdivision required him to fill the land to prevent health hazards. However, the land was declared a wetland and he was prohibited from filling it, and thus from building on it. Fourteen years after he bought the land, Mr. Bowles finally received a judgement from the U.S. Court of Federal Claims for the taking of his land.

Bob and Mary McMackin of Pennsylvania obtained all the necessary permits to go ahead and build a house on their property. They did just that and lived in that house for 4 years. Then, they were informed that their seemingly dry land had been designated a wetland and that they faced criminal sanctions and staggering fines.

While the protection of wetlands, endangered species, and many other public concerns is important, the Committee believes that these concerns must be fairly balanced with the rights of the individuals who are forced to bear the cost of these regulations. The right of compensation guaranteed by the fifth amendment and enforced by S. 605 establishes just such a fair balance.

A. CURRENT TAKINGS CLAUSE JURISPRUDENCE

Due to, until recently, a confusing Supreme Court jurisprudence, property owners have been frustrated in their attempts to receive just compensation for regulatory actions that effected a taking of their property. In part, this stemmed from the jurisprudential challenge of defining what constitutes a regulatory taking. Courts have found it relatively easy to find takings in physical invasion or physical seizure cases.[6] But courts have more difficulty in determining when a government regulation so circumscribes the exercise of property rights that the government essentially effects a taking. Justice Holmes provided little help aside from describing the difficulty of the question in the 1922 case of *Pennsylvania Coal Company* v. *Mahon.*[7] As Justice Holmes recognized, "[G]overnment could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law."[8] At the same time, however, Justice Holmes also

[6] *See, e.g., Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).
[7] 260 U.S. 393 (1922).
[8] Id. at 413.

declared that a substantial dimunition in value caused by government regulation could amount to a taking. As he put it, "if regulation goes too far it will be recognized as a taking."[9]

In the 74 years since Justice Holmes' comment, the Supreme Court has not provided firm guidance on what constitutes a regulatory taking. In general, the Court has adopted an ad hoc balancing approach, exemplified by *Penn Central Transportation Co.* v. *New York City*,[10] which balances the economic impact of the regulation against the character of the regulation and its restrictions on the property owner's investment-backed expectations. Not only were these factors so abstract as to be easily manipulable, they were so ambiguous that they failed to provide either government or property owners with any certainty concerning whether certain action would amount to a taking. As a result, every takings case deterioriates into a fact-specific inquiry that produces incoherent and inconsistent applications of law with little future significance.

This confusion has been further compounded by the unclear division of jurisdiction over different types of takings claims. Under the Tucker Act,[11] a plaintiff seeking monetary damages for an alleged taking must file in the U.S. Court of Federal Claims. However, the Tucker Act does not provide for injunctive relief. A person seeking injunctive relief must file in the proper U.S. District Court. A problem occurs when people seek both injunctive and monetary remedies. Whichever court they appear in first, the government argues that the venue is improper, and the property owners are shuffled back and forth from one court to the other. This conundrum has come to be known as the "Tucker Act Shuffle" and it wastes time and money.

S. 605 resolves the "Tucker Act Shuffle" by amending the Tucker Act to provide concurrent jurisdiction for monetary and injunctive claims in both the claims court and the district courts. Thus, the property owner can choose the most convenient forum and still be assured that technical legal maneuvering over the court's jurisdiction will not stand in the way of justice. Further, the bill provides for all appeals of trial court decisions to go to the U.S. Court of Appeals for the Federal Circuit. That will ensure consistency in the law and discourage forum shopping. Since the Federal Circuit already hears all appeals of monetary takings claims, that court has the necessary expertise to handle these cases.

In the last decade there have been improvements in takings jurisprudence. The Supreme Court has, in part gradually replaced the ambiguous balancing test of *Penn Central* with the bright lines of *Nollan* v. *California Coastal Commission*,[12] *Lucas* v. *South Carolina Coastal Council*,[13] and *Dolan* v. *City of Tigard*.[14] In *Nollan*, State law required property owners who wanted to replace a small bungalow on their beachfront lot to receive a permit from the State. As a condition for granting the permit, the State sought to force the owners to provide a public easement for beachgoers to pass across their beach, which was located between two public

---

[9] Id. at 415.
[10] 438 U.S. 104 (1978).
[11] 28 U.S.C. 1491.
[12] 483 U.S. 825 (1987).
[13] 505 U.S. 1003 (1992).
[14] 512 U.S. ———, 114 S. Ct. 2309 (1994).

beaches. The State asserted that the easement was needed because the Nollans' house would block access to the beach, would interfere with the public's "visual access" to the beach, and would create a "psychological barrier" to members of the public who might want access to the beach.

The Supreme Court found that this requirement constituted a taking of property for which the State owed compensation. The Court held that the State's asserted interests did not justify the condition, because the condition did not serve the public purposes related to the permit requirement. In other words, there was no reasonable relation or "essential nexus" between seeking an easement and the public purpose in granting a building permit. The Court noted that seizing a public-access easement normally would constitute a taking under the fifth amendment. The Court reasoned, however, that the government has the power to forbid particular land uses in order to advance some legitimate purpose under the State's police power. This power, therefore, includes the power to condition land use upon some concession of the owner, so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use.

In *Lucas*, the Court continued its movement toward a property rights regime protected by bright-line legal rules. A property owner, David Lucas, had bought two residential lots on a barrier island for the purpose of building single-family homes. Two years after he bought the property, the State passed a beachfront management act which prohibited the construction of any permanent homes on the land. The State argued that the bar on homebuilding was legally justified because it was prohibiting a "harmful or noxious use"—which in this case was building a house in an area susceptible to erosion and wildlife habitat degradation.

In a 6–3 decision, the Court rejected the State's argument that its regulation did not work a taking. The Court stated that any government regulation that denies all economically beneficial or productive use of land is a categorical taking for which just compensation is owed. The Court dismissed the State's claim that the ban on construction was necessary to prevent a harmful or noxious use of the land. Significantly, the Court recognized that the government could not ban all economic use of a property unless the activity banned was understood to be a public nuisance (such as pollution by a factory in a residential zone) and would have been found to be so by the State courts. As the Court stated, "Any limitation [on the use of property] so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[15] Because using one's land to build a residential home has never been considered a public nuisance, the Court reversed the South Carolina Supreme Court and remanded for reconsideration.

In *Dolan*, the Court continued to elaborate upon the necessary link between the imposition of a condition and the government interest behind the land use regulation. Florence Dolan owned a plumbing and electric supply store in the central business district

[15] *Lucas*, 505 U.S. at 1029.

of the city of Tigard, OR. Dolan sought a permit from the city to expand her business by doubling the size of her store and creating a paved parking lot. The city approved the permit, subject to conditions: (i) that Dolan dedicate a portion of her property on a floodplain for improvement of a storm drainage system; and (ii) that Dolan dedicate a 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle path. The overall amount of land the city sought amounted to about 10 percent of the property.

The Court held that the conditions placed on the permit amounted to a taking for which just compensation was owed. Under the test enunciated in *Nollan*, the Court examined whether an "essential nexus" existed between a legitimate state interest and the permit condition exacted by the city. Finding that such a nexus was present, the Court then asked whether a "rough proportionality" existed between the exaction (the dedication of the path and floodplain) and the use to which the property was being put (the expansion of Dolan's store). As the Court put it, "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." [16] The Court found that there was absent the required proportionality between the easement/dedication and the proposed new building—thus, the Court concluded that a taking had occurred.

These three cases have begun to restore the bright-line protection for property rights intended by the Framers. Under *Penn Central's* ambiguous balancing test, takings law provided little protection for individual property owners. Neither property owners nor government agencies could determine in advance whether a certain action would amount to a taking, because neither party could predict what result the Court would reach until it actually completed its balancing analysis. Without certainty and predictability, property owners cannot make reasonable economic assumptions based on the value of their land, and government actors cannot tailor their future actions to the requirements of the law. Instead, both owners and the government must engage in protracted, expensive litigation to determine the exact boundaries of the Takings Clause in each specific case. By replacing *Penn Central's* balancing scheme with bright-line rules, the Court has taken an important step in restoring the Constitution's guarantee of true protection for property rights. Only when governed by a regime of clear rules can property owners safely enjoy the value of their property and Government agencies conduct their actions consistently with the law.

Lucas also addressed one of the most difficult problems in takings jurisprudence: whether governmental police power and common law nuisance are separate exceptions to the fifth amendment's compensation requirement. In summary, the *Lucas* decision reaffirmed the original understanding of the fifth amendment that the common law of nuisance both "defines the limits of individual property rights and the general scope of police power." [17]

---

[16] *Dolan*, 512 U.S. at ———, 114 S.Ct. at 2319-20.

[17] Douglas W. Kmiec, *At Last, the Supreme Court Solves the Takings Puzzle,* 19 Harv. J.L. & Pub. Pol'y, 147, 148 (1995).

In the 1887 case of *Mugler* v. *Kansas,* the Court held that the Government did not violate the Takings Clause when it prohibited the use of a property as a public nuisance.[18] In that case, Kansas prohibited the production or sale of alcohol within the State. The Court rejected the challenge to the statute by a brewery owner because use of the property constituted a public nuisance. This rationale, if fully expanded, however, threatened to give government a blank check on the property rights of landowners—government always could merely claim to justify a taking on the ground that it was acting to protect public health and safety,[19] without limit on what it defined as the public's health and safety interests. *Lucas* addressed this issue by returning the public nuisance doctrine to its roots. A government cannot defend a taking by reflexively ascribing all of its rationales as based on the ground of public health and safety. Instead, it must show that the activity is barred by "background principles of the State's law of property and nuisance" that already inhered in the title of the property when the owner acquired it.[20] Therefore, to the extent government prohibits the use of property on demonstrable public health and safety grounds, its action will fall well within the State common law public nuisance exception recognized by *Lucas*.

To be sure, there are several areas of takings law that the Court has yet to resolve in a satisfactory manner. Perhaps the most significant problem is in the area of partial takings. Some may mistake the Court's "deprivation of all economically beneficial use" language in cases such as *Agins* v. *Tiburon*[21] to mean that no compensation is owed for less than full takings of property. Such a conclusion is clearly erroneous. If there were any doubts about the requirement of just compensation for partial takings, *Lucas* has laid the issue to rest.[22] Indeed, since *Lucas* several lower courts have analyzed partial takings claims utilizing balancing tests, not requiring a total deprivation to find a taking.[23] The Court, however, has yet to identify at what point a dimunition in value—resulting from government action—amounts to a compensable taking. This is understandably a difficult line for the court to draw and different opinions on this issue have not provided clear guidance for either property owners or for government agencies.

Another problem upon which some ambiguity exists involves what portion of the property is to be used to calculate whether a taking has occurred. This is known as the "denominator prob-

---

[18] 123 U.S. 623 (1887).

[19] The traditional police power exception is derived from the maxim *sic utere tuo ut alienum non laedas* or "use your own property in such a manner as not to injure another." *Keystone Bituminous Coal Ass'n* v. *DeBenedictis,* 480 U.S. 470, 492 (1987). This narrow police power exception was equated by the *Lucas* Court to common-law nuisance limitations on property use.

[20] *Lucas,* 505 U.S. at 1029.

[21] 447 U.S. 255 (1980).

[22] Responding to the dissent's argument that a landowner whose property lost 95 percent of its value would receive no compensation under the Court's rule, the Court stated that "[t]his analysis errs in its assumption that the landowner whose deprivation is one step short of complete is not entitled to compensation." *Lucas,* 505 U.S. at 1019 n.8.

[23] *Florida Rock Industries* v. *United States,* 18 F.3d 1560 (Fed. Cir. 1994); *Bauer* v. *Waste Management of Connecticut, Inc.,* 662 A.2d 1179 (Conn. 1995). These courts apply an *ad hoc* balancing test to determine whether the interference with property amounts to a partial taking.

lem."[24] For example, in cases where the government allows only a certain portion of land to be developed, the question arises whether those portions upon which development is prohibited are to be considered taken by the government. Alternatively, courts could consider that these "affected portions" are part of the larger property, one with a substantial residuary value overall, in regard to which a partial taking or no taking at all may have occurred. Under the first approach, the denominator for purposes of calculating a taking is only that portion of the land that can no longer be used due to government regulation. Under the second approach, the entire parcel of land, including the portion that may be developed, becomes the denominator. Although lower courts have held that the portions of the property to be considered are only those for which certain uses have been denied,[25] the Supreme Court has not reached this question.

B. EXPLANATION OF THE BILL

The Omnibus Property Rights Bill effectuates the Constitution's guarantee of a right to just compensation when the government takes private property for public use. It begins by requiring Federal agencies to take the costs of taking property into account when formulating policy, and it provides for a speedy administrative remedy for property owners who seek compensation. The bill also allows for alternative dispute resolution mechanisms to encourage quick settlement of takings claims. For cases that go to Federal court, the bill codifies recent Supreme Court decisions and clarifies the law in regulatory takings cases. The declaration of clear, bright-line rules of liability will lead to lower costs overall, as both agencies and property owners become fully aware of the limits of the government's power to take property. The Committee expects that the codification of these bright-line rules will ameliorate the ad hoc and arbitrary nature of takings jurisprudence, as Chairman Hatch stated when he introduced the bill.

1. Placing incentives on agencies to reduce takings

Under current law, agencies have no incentive to take into account the costs that their actions impose on private property owners. This leads to irresponsible and inefficient rules, particularly when the costs of taking property are counted. Unfortunately, agencies do not internalize these costs. Title IV of the bill forces agencies to consider the impact of takings in their policymaking and to evaluate their policies with these costs in mind. This section of the bill codifies Executive Order 12,630,[26] which requires Federal agencies to conduct a "private property taking impact analysis" before issuing or promulgating any rule, regulation, or other agency action. The analysis requires agencies to estimate publicly whether contemplated policies will result in takings, how much compensation will be owed, and whether alternative means exist that will produce lower takings costs. The Committee expects that

---

[24] *See Keystone Bituminous Coal Association* v. *DeBenedictis*, 480 U.S. 470, 497 (1987); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967).

[25] *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994).

[26] Exec. Order No. 12,630, 3 C.F.R. 554 (1987–88), *reprinted in* 5 U.S.C. 601 (1994).

when agencies are forced to consider the impact of their actions, they will choose less costly policies that incur lower takings costs but that still achieve their stated goals of environmental, health, and safety protection.

Title IV also addresses rules and regulations that either were promulgated before codification of the Executive order or still result in takings even after undergoing an impact analysis. First, the bill prohibits the promulgation of a final rule if it will result in an uncompensated taking. Second, the bill requires agencies to review regulations that result in takings of private property. Where appropriate, agencies must re-promulgate regulations to reduce such takings to the maximum extent possible. This section will force agencies to review existing rules to ensure that they undergo a taking analysis.

Other provisions in the bill operate to place additional incentives upon agencies to internalize the cost of takings resulting from their actions. Section 508(d) and Section 204(f), located in titles V and II, require that any compensation for a taking come out of an agency's budget. This will force agencies to internalize the costs of takings so that they may more accurately weigh the costs and benefits of their actions.

2. Providing for swift resolution of takings claims

Under current law, property owners must seek compensation for a taking in Federal court. The high costs and long delays of litigation in Federal court pose barriers to all but the most wealthy property owners. Litigation costs also add to the price both of vindicating property rights and of undertaking agency action. Title V of the Omnibus Property Rights Bill seeks to provide a swifter remedy for property owners and quicker resolution of challenges to agency decisions by creating an administrative appeals process. Because most takings occur under the Endangered Species Act of 1983[27] and section 404 of the Federal Water Pollution Control Act,[28] (under which the wetlands regulations have been promulgated), the bill requires the creation of appeals procedures to review agency decisions under these two acts. The bill also creates an informal compensation mechanism that allows property owners to seek relief either directly from the agency or through arbitration. Additionally, payments will be made from an agency's appropriated budgets.

Title V amends the Federal Water Pollution Control Act to create an administrative appeals mechanism. It allows property owners to challenge the denial of a permit to develop their land under the wetlands regulations before a neutral agency official. A similar provision amends the Endangered Species Act to create an administrative appeals process. It is expected that these appeals procedures will give private property owners the ability to require agencies to reconsider the wisdom of a decision to take private property. It is also expected that these procedures will require agencies to examine their actions in a timely manner to determine if they are consistent with the substantive standards of this bill. With the avail-

[27] 16 U.S.C. 1531–1544 (1994).
[28] 33 U.S.C. 1344 (1994).

ability of an effective administrative appeals system, agencies and property owners may avoid the heavy costs and delays of Federal court litigation. However, the creation of the administrative appeals process should in no way be construed to impose an exhaustion requirement upon property owners, who always have the option at any time of seeking relief in Federal court under the bill or directly under the Constitution. The Committee also notes that nothing in these procedural amendments alters the substantive requirements of the Clean Water Act or the Endangered Species Act.

Even if, after an administrative appeal, the agency chooses to go forward with a taking decision, the Committee expects that the agency will engage in good-faith negotiations with the property owner to settle the case. To this effect, the bill also creates a right on the part of property owners to negotiate for compensation for any taking that occurs as a consequence of agency action, and it requires agency heads to respond to offers to settle.

Should the parties fail to reach an agreement, the owner may seek arbitration. Much of the problem in the current legal regime governing takings law is the expense in suing to receive meaningful relief. The bill provides for the use of alternative dispute resolution mechanisms, which are now commonly used to resolve numerous commercial and family disputes. Use of these alternative dispute resolution measures should provide for the quick and efficient resolution of takings disputes without resort to time-consuming and expensive litigation. This will accrue to the benefit of both property owners and agencies, which both have an interest in quickly resolving property rights disputes and in reducing litigation costs.

But, ultimately, the only way to force agencies to internalize the costs of their actions is to force them to realize the financial burdens caused by their decisions. Under current law, if an agency takes property and loses in court, the compensation comes from the Federal Government's Judgment Fund. Since costs to the Judgment Fund are not borne directly by the taking agency, the agency has no incentive to reduce its taking activities. The Omnibus Property Rights Act changes this unacceptable incentive structure by requiring agencies to pay all takings judgments and awards out of its own budget. If an agency takes property in violation of the Constitution, then it will realize the costs of those actions. The Committee hopes that this arrangement will encourage agencies to refrain from taking private property except when the public good truly requires it.

With these mechanisms in place, the Committee expects agencies to self-police their actions in order to decrease the taking of private property unnecessarily. The bill requires agencies to develop rules and regulations that will protect the constitutional and legal rights of property owners when the agency makes final decisions restricting the use of property. The Committee expects that agency heads will establish internal agency mechanisms to protect property rights.[29] It is hoped that these rules and regulations will encourage

[29] Agency officials are prohibited from entering privately owned property to collect information about the property without the permission of the owner. This will prevent overzealous Federal officials from entering private land for the purpose of deciding it is covered by the Endangered Species Act or the Clean Water Act without the owner's permission.

agencies to avoid unnecessary takings in the first place, and thereby reduce overall litigation costs and the delay to agency actions produced by litigation.

3. Codification of existing standards

Should these institutional incentives and new dispute resolution mechanisms fail to succeed, property owners have the final option of seeking redress in Federal court. The Omnibus Property Rights Act seeks to codify and clarify the legal protections for property owners by establishing clear, bright-line rules concerning the substantive law to be applied by the Federal courts and agencies in takings cases. For the most part, these rules are merely restatements of existing law, both on takings, the definition of property, and the amount of compensation. In the area of regulatory takings, the bill sets out a standard that clears up confusion in the courts concerning when a diminution in value amounts to a taking. The bill also sets out the procedures to be followed in takings cases and implements technical jurisdictional modifications that allow property owners to bring such cases in any federal court. The clear declaration of these bright-line rules will produce reduced numbers of takings and compensation payouts (as well as litigation costs), because both agencies and property owners will be fully aware of standards governing their conduct.

The Committee adopted definitions that provide full, fair, and adequate protection for the owner's economic investment in his or her property. The Committee intends that the definition of property includes most forms of real property, water and land rights, and contracts with the Federal Government.[30] The Committee also intends to adopt the definition of property that exists in the law of the States, including future legal developments in the State law of property. Just compensation is defined as compensation equal to the full extent of a property owner's loss, including the fair market value of the property plus interest.

In terms of the timing of a taking, a taking is considered to occur when a State has passed a law, or a regulation is promulgated, that takes property, or when a necessary permit or license is denied. For example, in the context of wetlands regulations, a taking has not occurred when the Clean Water Act was passed or even when the wetlands regulations were promulgated. In neither case does the owner yet know that his property is covered by those Federal laws. A taking is deemed to have occurred when the owner is denied a permit to develop his land because it has been classified as a wetland. It is only at that point—in the permitting process—that the owner learns that his property is subject to the restrictions of the wetlands regulations. To deem the time of taking to be the date of passage of the Clean Water Act or of the regulations promulgated pursuant to it would be unfair and unjust and would require owners to challenge laws that may not yet even apply to them.

Title II's most important function is to codify the substantive standards that apply to takings. The Committee intends that these standards apply not just to cases brought in Federal court, but also

---

[30] *Nixon* v. *United States*, 978 F.2d 1269 (D.C. Cir 1992).

to agency decisionmaking and appeals processes. These standards generally prohibit the government from imposing exactions upon property owners in exchange for development permits or licenses unless there is an actual, rational relationship between the two. They require compensation whenever property owners are denied all use of the land, or whenever the State has imposed a significant reduction in value of the property. As under current case law, the government shall bear the burden of proof for showing a nexus or proportionality between the purpose of a government exaction and the use of the property.

A comparison of the statutory language with the holdings of *Nollan, Lucas,* and *Dolan* demonstrates that the Committee intends to codify existing taking law. Several portions of the bill directly incorporate the substantive standards enunciated in these cases. In this manner, Congress can fulfill its duty to enforce the Constitution and to defend individual rights. It should be emphasized, however, that the Committee does not intend to set in stone federal protections for property rights. Thus, the bill also contains a general clause incorporating any future expansions of private property rights under the fifth amendment.

In the area of partial takings, the Committee has included a bright-line standard in an effort to clarify this difficult area of the law. Under the bill, if a property owner suffers a 33-percent dimunition in the value of his or her property because the government has taken a property right, the owner may seek just compensation. This provision is not designed to provide compensation for mere dimunitions in value that result incidentally from Federal action, such when businesses near a military base suffer business and property losses when the base closes. Instead, the section is designed to address situations in which the Federal Government prohibits the exercise of a property right—such as when the Army Corps of Engineers forbids an owner from developing his or her land because they have designated the property a wetland—that produces a corresponding decline of 33 percent or more in the property's value.

As noted before, the courts have recognized that claims for a partial taking may be brought under the fifth amendment, but they have failed to articulate a clear standard on how much of a dimunition in value is required. The Committee believes that it is Congress' role to step in and clear up ambiguous areas of law, such as this, which may lead to protracted litigation and the frustration of individual rights. For this purpose, the Committee also has codified the "affected portion" doctrine as articulated by the U.S. Court of Appeals for the Federal Circuit in the *Loveladies Harbor, Inc.* v. *United States.*[31] When the government completely takes a portion of the property but permits the use of another portion, the taken portion is to be used as the "denominator" when the court calculates whether a taking has occurred and what just compensation is owed.

A significant area of uncertainty in takings law has been the extent of the government's interest in protecting public health and safety when taking property. To clarify this area of the law, title

[31] 28 F.3d 1171 (Fed. Cir. 1994).

II of the bill codifies the nuisance exception as described in *Lucas.* According to the Court, government action will not amount to a taking if the use of the land prohibited constitutes a nuisance. Courts are to refer to the nuisance law of the State within which the property is located. Nuisance law is generally the same throughout the 50 States.[32]

A few examples will illustrate the public nuisance exception. If a property owner wishes to use his or her property in a manner that would constitute a public nuisance, such as by running a smelting plant in the middle of a residential neighborhood, the owner will not suffer a taking when the government prohibits operation of the plant. Similarly, if the property by its very nature constitutes a public nuisance, such as rotten food or infected trees, its destruction by the government will not constitute a taking. But use of property for commonly accepted purposes, such as for building a house in a residential area, has never been considered a public nuisance. The Committee believes that the public nuisance exception strikes the proper balance between protecting property rights and permitting legitimate exercises of government power to take private property in the public interest.

4. The cost of S. 605

In this time of budgetary constraint, the Committee is very concerned about maintaining fiscal responsibility. S. 605 will not inhibit the Congress in its effort to balance the budget.

While it is certainly true that the bill will require compensation, the Committee is confident that the incentive structure built into the bill will keep costs at a minimum. As agencies review the potential costs of their actions they will be able to predict the resulting takings liability much more accurately thanks to the legal clarifications in the bill. Further, these costs will be taken into serious consideration, as the agency which is responsible for the taking will be the same one that pays the compensation. Thus, the Committee expects that agencies will change their behavior so as to accomplish their important statutory goals with a minimum of infringement on private property rights.

The Committee further notes that this analysis is supported in full by the cost estimate provided by the Congressional Budget Office.[33] In that letter, CBO agrees with the Committee that the built-in incentives will encourage agencies to act more responsibly. Thus, the administrative cost of the bill will be a relatively small sum, and compensation costs even smaller still. The CBO also notes that since all compensation will be paid out of appropriated agency funds, pay-as-you-go procedures would not apply. The Committee agrees with this conclusion.

Opponents of S. 605 have made the claim that it will cost the Federal Government a large amount of money. To support their claim, they cite the estimate put forth by the Office of Management and Budget in a June 7, 1995, letter from OMB Director Rivlin to Judiciary Chairman Hatch. The Committee notes that this letter is not, in fact, an estimate of the potential costs of S. 605. As the let-

[32] Restatement (Second) of Torts.
[33] See part V, *infra.*

ter itself states, "OMB has not completed the complex task of estimating the Government-wide cost of S. 605 * * *." This lack of analysis is also made clear by the absence of any discussion to support the estimate in the letter. Even the estimate itself is unclear. Director Rivlin asserts that S. 605 will cost "several times the $28 billion cost of the House-passed legislation." The OMB letter does not even provide an actual estimate. The Committee does not find the OMB "estimate" credible.

The Committee chooses to rely upon the well-researched and well-supported estimate from the neutral Congressional Budget Office. That estimate was presented in an October 17, 1995, letter from CBO Director O'Neill to Chairman Hatch. Based on extensive research and supported by several pages of analysis, CBO concluded that the cost of compensation to the Federal Government under S. 605 would be no more than $30 to $40 million a year, a tiny fraction of the OMB figure.

C. ANSWERS TO CRITICISM OF THE BILL

Critics argue that S. 605 represents a significant departure from existing takings jurisprudence. This claim is predicated on several contentions: (1) the bill requires compensation for all and any diminution of property value caused by Federal actions; (2) the "bright line" takings standards established by the bill contravene the "*ad hoc*" approach to takings established by the Supreme Court; (3) the bill "federalizes" and expands the definition of property interests beyond the state law definitions of property; and (4) the bill's nuisance exception is unworkable. These contentions are erroneous, and are answered in turn.

1. Diminution in value

S. 605 does not require compensation for absolutely any diminution of the value of property caused by Federal regulation above the bill's 33-percent threshold requirement. This bill incorporates case law construing both what defines a property interest and what constitutes a "taking" requiring just compensation.

Since the 19th century, courts have recognized that to constitute a regulatory taking, the object of the regulation must be the property itself.[34] In other words, indirect results of Federal action—consequential damages—are not compensable under a takings claim. Thus, as alluded to above, the market-based diminution of value of a home caused by the closing of a nearby military base by presidential order is not compensable under this bill.[35]

Moreover, the Supreme Court has held that preexisting governmental restrictions on the use of private property are not "takings"

---

[34] *See Gibson* v. *United States*, 166 U.S. 269 (1897)(holding consequential damages to river landing due to construction of dike not compensable under fifth amendment); *Transportation Co.* v. *Chicago*, 99 U.S. 635 (1878)(building of tunnel under Chicago River that interfered with business did not amount to a taking since the object of action was not business). This is also true in State law cases. *See, e.g., Murphy* v. *Detroit*, 506 N.W.2d 5 (Mich. Ct. App. 1993) (holding reduction in value of 75 percent of supermarket and medical facility caused by city's acquisition of adjacent residential property as part of urban renewal project not a compensable taking because merely a consequential affect of city action).

[35] This is expressly made clear by a change made by the "Chairman's mark" to S. 605, which now defines a "taking of private property" to mean "any action whereby private property is the *object* of that action and is taken so as to require compensation under the fifth amendment * * * or under this Act * * *." Section 203(7)(A) (emphasis added).

vis-a-vis the new property owner.[36] The permissible scope of property rights, consequently, is defined by the constitutionally allowable legal constraints that exist at the time of acquisition or possession of the property, even if the regulatory policy reduces the property values of a general class of property holders.[37] The Court has gone so far as to hold that where property is subject to a preexisting regulatory scheme, there is no need for compensation for loss of value for that property because the regulated entity has little or no "reasonable expectation" for unrestrained use of the property.[38]

Thus, the examples critics have raised—a reduction in property value as a result of a decision by the FAA to ground an airplane for safety reasons, or the FDA forbidding the introduction of a drug into the stream of commerce for the protection of public health—are not compensable takings because those industries are subject to existing heavy regulation. Of course, the actual result depends in great degree on the specific facts of those cases. Compensation in these situations, as explained below, may be denied as well on a public nuisance theory. Wetlands and endangered species land use limitations in most cases do not fall in the preexisting law category since takings arise in these circumstances from denial of a permit after the property was purchased.[39]

2. Bright-line standards

Critics of the bill complain that the essentially *ad hoc* approach used by courts to determine whether a regulatory taking occurs is contravened by the bright line standards of what constitutes a taking and the definition of property established by the bill. This is simply not the case.

The essentially *ad hoc* approach established by the Supreme Court in *Penn Central Transportation Co.* v. *New York*[40] to determine a taking has been superseded by more recent Supreme Court decisions. For instance, the Court in *Nollan* v. *California Coastal Commission*,[41] established that there must be a substantial nexus between a governmental exaction and a particular problem the regulation was designed to redress. Similarly, *Dolan* v. *City of*

---

[36] *Lucas* v. *South Carolina Coastal Council*, 112 S. Ct. 2886, 2900 (1992)(Such preexisting limitations on property use "inhere in the title itself."); *see Whitney Benefits, Inc.* v. *United States*, 18 Cl. Ct. 394 (1990).

[37] *See Mitchell Arms, Inc.* v. *United States*, 7 F.3d 212 (Fed. Cir. 1993)(holding revocation of firearm import permits by BATF not a taking because expectation of selling semiautomatic rifles was not inherent in ownership of rifles, but subject to federal regulatory power).

[38] *E.g., Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005–1008 (1984)(noting key factor in determining whether regulation requiring disclosure of trade secret amounts to taking is whether regulation interferes with reasonable investment backed expectations). It should be noted that at common law certain businesses and occupations, such as common carriers and inns, were subject to heavy regulation and strict liability for certain torts. Traditionally, and consistent with the more modern judicial "reasonable expectation" approach to the use of property interests in takings cases, courts have given great latitude to governmental regulation of businesses and occupations "clothed with the public interest."*See generally* Christopher G. Tiedeman, *A Treatise on the Limitations of Police Power in the United States* (1886), ch. IX, and cases cited therein.

[39] Courts have held that takings occur when the applicable Federal action directly affects the use of private property. Usually, this means that takings occur at the time of the regulation's promulgation. *See Williamson County Regional Planning Commission* v. *Hamilton Bank of Johnson City*, 473 U.S. 172, 186–87 (1985); *Agins* v. *Tiburon*, 447 U.S. 255, 260 (1980). Because determination of whether property is a wetlands is a question of fact-finding, courts have found that a taking in a wetlands context occurs at the time a use permit was denied. *See Bowles* v. *United States*, 31 Fed. Cl. 37 (Ct. Fed. Cl. 1994).

[40] 438 U.S. 104 (1978). *Penn Central* looked to a number of factors to be balanced to determine the existence of a taking, including the character of the government action, the economic impact of the regulation, and whether reasonable investment-backed expectations were interfered with.

[41] 483 U.S. 825 (1987).

Tigard,[42] established a bright-line test that there must be a demonstration of a "rough proportionality" between the "amount" or "degree" of the exaction and the extent of the restriction on property use needed to alleviate or prevent harm. The bill does nothing more than codify these recent types of cases that establish bright-line standards.

3. Definition of property

As to the definition of property rights contained in the bill, the actual definitions were taken directly out of the case law establishing the particular property interest involved. For instance, the bill codifies contract rights as a property interest. This is predicated upon the Supreme Court case of *Lynch* v. *United States*,[43] which definitively established in 1934 that contract rights are property interests protected by the 5th and 14th Amendments.[44]

4. The nuisance exception

Critics make three primary arguments against the nuisance exception in the bill. They claim that: (1) the nuisance exception is too amorphous or broad to be workable; (2) the nuisance exception is too narrow or restrictive to allow enforcement of Federal health, safety, and environmental statutes and regulations without the government having to pay compensation; and (3) because the bill's nuisance exception looks to State law for definition, the bill would establish 50 different nuisance exception standards hindering uniformity, the necessary predicate for Federal legislation. These criticisms are misplaced. Section 204(d)(1) of S. 605 incorporates the common law nuisance exception to the payment of just compensation under the fifth amendment. Actually, the nuisance exception is not an exception at all. At common law, property consists of a bundle of rights encompassing the possession, use (or "enjoyment"), and disposition of one's acquisitions; any limitation on those rights was considered an unjustified interference with property.[45] It was

---

[42] 512 U.S. ———, 114 S. Ct. 2309 (1994).

[43] 292 U.S. 571 (1934).

[44] This answers the criticism that codification of contract rights as a protected property interest is a novel departure from existing law. This argument maintains that such codification would force the Federal Government to pay compensation when, for instance: (1) an agency cannot fulfill the terms of a contract to supply water because of a drought, or (2) in a situation where Congress terminated a subsidy program to supply water at less than the market price. In the first situation, there is simply no contract to enforce under the common law "Act of God" or *force majeur* doctrine, whereby the contract is vitiated because of a failure of consideration, in this case a drought preventing the delivery of water. *See* Arthur C. Corbin, Corbin on Contracts, § 1324 (1953). The second situation falls under the so-called *sovereign acts* doctrine, whereby the United States need not pay compensation when it acts to restrict contract rights and the use of property in its *sovereign* capacity, unless the general and public act or legislation restricting the contract and use of property is specifically directed to a single class of property holders. *See, e.g., Horowitz* v. *United States,* 267 U.S. 458 (1925) (holding United States not liable for obstruction of particular contract resulting from general and public acts as a sovereign, nor for losses resulting from embargo placed on freight shipment of silk); *Winstar Corporation* v. *United States,* 64 F.3d 1531, 1548 (Fed. Cir. 1995) (holding United States may not *ipso facto* abrogate contracts under the *sovereign acts* doctrine; it may do so only pursuant to general and public acts when acting in a sovereign capacity and not in a role the equivalent to a private contractor). Furthermore, the Supreme Court has held that there exists no constitutional right to a particular subsidy. *See Lynch* v. *United States,* 292 U.S. 571, 577 (1933) (noting that pensions, grants, and such are gratuities that may be eliminated by Congress at any time and are not vested rights). *U.S. Railroad Retirement Board* v. *Fritz,* 449 U.S. 166, 174 (1980) (noting railroad benefits may be altered or eliminated "at any time"); *Fleming* v. *Nestor,* 363 U.S. 603 (1960) (holding social security program benefits may be terminated without paying compensation).

[45] *See* 3 William Blackstone, Commentaries *216-222.

universally understood that this definition of property did not encompass uses that deprive or disturb another in the enjoyment of his property, nor did it include the right to use property in a way that damages the property rights of a third party. Thus, property may not be used in a manner that constitutes a nuisance.[46]

At common law there are two types of nuisances, public and private. Private nuisance has been defined as an unwarranted interference with the use and enjoyment of property, particularly land.[47] Public nuisance, on the other hand, is an unreasonable interference with the rights and welfare of a community.[48] This type of nuisance is usually addressed by an action seeking injunctive relief and monetary compensation, brought by the state to protect public health and safety. Both types of nuisance actions require a demonstration of the existence of harm or an unreasonable risk of harm.

Although the Federal Government does not constitutionally possess a common-law police power,[49] the Supreme Court historically has held that the Federal Government has inherent authority to prevent "noxious" uses of property and need not compensate for restrictions on property use that amount to common-law nuisances.[50] The recent *Lucas* decision requires that a regulation must abate nuisances as defined by the State in which the property is located in order to escape the just compensation requirement of the Takings Clause. Following *Lucas*, a number of subsequent court cases have rejected police power, general welfare, or purely environmental values, such as protection of open spaces, aesthetic views, wildlife habitats, or wetlands as sufficient bases to justify resorting to the nuisance exception.[51] Courts now require that harm to health, safety, and the environment be factually demonstrated to justify a regulation being classified under the nuisance exception.[52]

Consequently, the critics' argument that S. 605's nuisance exception is not broad enough to cover some environmental statutes, is in a way beside the point. Plainly put, their argument is with the Supreme Court's *Lucas* decision and not the bill, which merely codifies the *Lucas* nuisance exception.

It has been claimed that the nuisance exception is too broad and amorphous. Critics of the bill point to various State nuisance cases

---

[46] Id. at 113. *See also* G. Jacob, *New Law Dictionary* (9th ed. 1772).

[47] *See generally* W. Page Keeton, Prosser and Keeton on the Law of Torts 619 (5th ed. 1984). See generally Richard Epstein, Takings: Private Property and the Power of Eminent Domain (1985). Professor Epstein concludes that the gravaman of private nuisance is the "physical invasion" of another's property by the tortfeasor. Such physical invasion could be by trespass, pollutants, or noise or other waves or particulates.

[48] Prosser and Keaton, at 643.

[49] Congress may legislate only pursuant to those specific and implied powers delegated to it by Article I of the Constitution. See, *e.g., United States* v. *Lopez*, 115 S. Ct. 1624 (1995).

[50] *E.g., Miller* v. *Shoene*, 276 U.S. 272 (1928) (destroying of red cedar trees to prevent spread of cedar rust disease to preserve apple crop not a compensable taking); *Mugler* v. *Kansas*, 123 U.S. 623 (1887) (shutting down of brewery pursuant to statute held not a taking because operating the brewery was tantamount to a "noxious" public nuisance).

[51] *See, e.g., Lucas* v. *South Carolina Costal Council*, 424 S.E.2d 484, 486 (S.C. 1992) (building house on barrier island); *Bowles* v. *United States*, 31 Fed.Cl. 37, 51 (1994) (house on wetlands lot).

[52] *See, e.g., M & J Coal Co.* v. *United States*, 47 F.3d 1148 (Fed. Cir. 1995) (applying *Lucas* and rejecting taking claim because prohibition on surface subsidence mining prevented imminent danger to public health and safety); *State* v. *The Mill*, 887 P.2d 993 (Colo. 1994) (radioactive uranium mill tailings).

to support this claim.[53] Upon closer review, however, the Committee found that the cited cases did not support the argument against nuisance law. In many of these cases the court found insufficient evidence of harm or risk to justify relief under a nuisance cause of action. Some cases were not applicable to the provisions of S. 605. In other cases, while courts did reach different conclusions based on similar pleadings, what is important is that the courts employed virtually the same nuisance standards. The Committee is satisfied that State nuisance law is both consistent enough and strong enough to provide a reasonable balance between compensable and noncompensable takings.

Courts in these cases applied the same nuisance standards because nuisance law is substantially the same throughout the 50 states.[54] In other words, State courts use the same nuisance standards. The result is a certain uniformity in the law. The fact that those differing conclusions are reached by different State courts is no different from situations where Federal district and appellate courts apply the same law and reach different results. Any "imprecision" flowing from the application of the nuisance standard is the result of the changing State definition of property.[55]

Yet, it is not unusual for Federal statutes to look to State law for substantive standards. This is true for diversity cases under the *Erie* doctrine,[56] the Federal Tort Claims Act (where the Act looks to the negligence standard of the State where the tort is committed),[57] and the Tucker Act[58] (where the interpretation of Federal contracts is based on the law of the State where the contract is effectuated). Indeed, it could be argued that when Congress incorporates State law standards into a Federal law, it is demonstrating more sensitivity to principles of federalism and comity between the Federal and State governments.[59]

III. Vote of the Committee

Pursuant to paragraph 7 of rule XXVI of the Standing Rules of the Senate, each Committee is to announce the results of rollcall votes taken in any meeting of the Committee on any measure or amendment. The Senate Judiciary Committee, with a quorum present, met on Thursday, December 21, 1995, at 10:15 a.m., to mark up S. 605. The following rollcall vote occurred on S. 605:

Motion to favorably report S. 605. The motion was adopted 10 yeas to 7 nays.

YEAS	NAYS
Thurmond	Biden
Simpson	Kennedy
Grassley	Leahy
Brown (proxy)	Simon
Thompson	Kohl (proxy)

[53] *See* S. 605: The Omnibus Property Rights Act of 1995, hearings before the Senate Committee on the Judiciary, 104th Cong., 1st sess., 56-60 (1995).
[54] See note 31, *infra*.
[55] Kmiec, *supra* note 17, at 154.
[56] *See Tompkins* v. *Erie R.R. Co.*, 305 U.S. 673 (1938).
[57] 28 U.S.C. 2674 (1994).
[58] 28 U.S.C. 1491 (1994).
[59] Kmiec, *supra* note 17, at 153.

Kyl	Feinstein (proxy)
DeWine	Feingold
Abraham	
Heflin	
Hatch	

IV. SECTION-BY-SECTION ANALYSIS

SECTION 1

Section 1 sets out the short title of this bill, the "Omnibus Property Rights Act of 1995."

Title I

SECTION 101

Section 101 states the findings upon which this legislation is based. Specifically, the findings are that the protection of private property is a cornerstone of liberty as codified in the fifth amendment of the U.S. Constitution, that Federal regulation has encroached on those rights, and that there is a need for Congress to clarify the law with which property owners may vindicate their rights.

SECTION 102

Section 102 states the purposes of this legislation, which are, generally stated, to codify and clarify existing Supreme Court precedent to facilitate the fair resolution of takings claims and to create procedural requirements which hold Federal agencies accountable for their actions with regard to takings.

Title II

SECTION 201

This section states the findings underlying this title.

SECTION 202

This section states the purposes of this title.

SECTION 203

This section defines terms used in this title. Since there has been some discussion on the definition of "property," the Committee wishes to clarify several points. First, all of the interests which make up the definition of property are well-established and accepted property interests that are accepted as property under current law. This definition, therefore, does not expand the concept of private property in any way. Second, the enumerated interests are not meant as an exhaustive list. Indeed, the bill explicitly states that the definition "includes," but in no way suggests that it is limited to, the enumerated interests. The definition is intended as a "floor" of core property rights for which protection is guaranteed, but permits Federal, State, and local governments to add to the list as they see fit.

SECTION 204

This is the operative section of title II, setting forth all substantive criteria with regard to takings litigation.

Subsection 204(a)

This subsection lists the legal standards that courts are to use in evaluating takings claims. It creates a two-prong test which claimants must satisfy in order to prevail. The first prong is stated in paragraph 1 and requires that the claimant be the owner of a recognized property interest which is the object of agency action. The Committee expects that this is the stage of the inquiry where investment-backed expectations will be considered.[60] As in the past, where the existence of a property right is unclear, the courts have looked to the reasonable expectations of the owner at the time of purchase. There is nothing in this bill which would alter that analysis. Claimants who cannot satisfy this test are ineligible for compensation under this bill. Even if this test is met, the claimant must meet the second prong. The second prong is stated in paragraph 2 and consists of several standards, any one of which must be met in order to satisfy that prong.

There are five possible ways to meet the requirements of the second prong. Subparagraph (A) is met if the claimant shows that the agency action does not substantially advance the stated government interest. This language is taken from the Supreme Court's holding in *Nollan* v. *California Coastal Commission*,[61] and the Committee intends to adopt the same meaning.[62]

Subparagraph (B) is met if the claimant shows that the agency action conditions the use of his property on a limitation of his property rights where no rough proportionality exists between the required limitation and the impact of the proposed use. This language is taken from the Supreme Court's ruling in *Dolan* v. *City of Tigard*,[63] and the Committee intends to adopt the same meaning.

It should be noted that the Court's analysis in *Dolan* cannot be limited to land-use restrictions and conditions. Throughout the opinion, the Court took pains to apply its analysis to the broader "property rights" and not to just real property. Moreover, subsequent Court decisions have applied the "essential nexus" test of *Nollan* and the "rough proportionality" test of *Dolan* to permit de-

---

[60] The extent to which a property owner reasonably expected, at the time the property is acquired, to be able to use his property is, the Committee notes, an important factor to the courts in determining the existence of a property right. *See Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124–25 (1978); *Lucas* v. *South Carolina Coastal Commission*, 505 U.S. 1003, 1030 (1992); *M & J Coal Co.* v. *United States*, 47 F.3d 1148, 1153 (Fed. Cir. 1995). Thus, in evaluating a claim brought under this Act, the reasonable, investment-backed expectations of the property owner will be a factor in determining whether the agency action at issue infringed upon a property right held by the claimant.

[61] 483. U.S. 825 (1987).

[62] The Committee understands the requirement to consist of two distinct inquiries. First, whether the government interest is a legitimate interest. Second, whether there is a reasonable nexus between that interest and the government action purporting to advance the interest. *Id.* The inclusion of the word "stated" is merely a recognition of the fact that in defending its action, the agency must state an interest and adds no new requirements or standards.

[63] 512 U.S. ———, 114 S. Ct. 2309 (1994).

nials,[64] waiver requirements,[65] impact fees,[66] as well as land-use conditions and restrictions.[67]

Subparagraph (C) is met if the claimant shows that the agency action results in a deprivation of substantially all economically beneficial use of the property. This language is taken from the Court's decision in *Lucas.*[68] The Committee intends to adopt the same meaning.

Subparagraph (D) is met if the claimant shows that the agency action diminishes the value of the affected portion of the property by at least 33 percent. The Committee believes that it is essential to clarify the law on this point. Currently, a property owner cannot be reasonably certain of what standard a trial court will apply. While recent cases have gone far in clarifying takings law, they are still not as clear as the Committee believes the law should be. Additionally, some courts still return unpredictably to older precedents which have not been explicitly overruled.

This unjustifiable uncertainty makes it impossible for a claimant to evaluate the strength of a claim. The Federal agencies which must defend against these claims are also hampered by this uncertainty for they cannot know how to structure their land-use regulations in a way to avoid takings problems. A bright-line test will solve both dilemmas, giving the property owner a reasonable ability to gauge the strength of his claim and the agencies the ability to regulate carefully and thus reduce the amount of takings they commit. Thus, the Committee believes that this clarification of the law aids both sides of a potential takings dispute.

It should be noted the *Lucas* Court rejected the notion that only all destruction of the value of property could constitute a taking.[69] Subsequent to *Lucas*, a number of courts have held that a partial regulatory loss short of denial of all economically viable use might constitute a compensable taking.[70] These courts generally apply an *ad hoc* analysis of factors such as fairness and regulatory burdens, an approach similar to the procedure used by Justice Holmes in *Pennsylvania Coal Co.* v. *Mahon*[71] to determine if the regulation "went too far" in diminishing the value of the property.

Consequently, the Committee believes that such an ad hoc approach should be jettisoned for a more coherent bright-line 33-percent "partial takings" standard. Thus, in a situation where there is a taking of property and the value of that property was diminished by 33 percent or more, the agency ought to compensate the property owner since the reduction of value is not a "mere diminution," but a partial taking.

---

[64] *See, e.g., Bowles* v. *United States,* 31 Fed. Cl. 37 (1994); *Whitehead Oil Co.* v. *Lincoln,* 515 N.W.2d 401 (Neb. 1994).

[65] *State* v. *Heckman,* 644 So. 2d 527 (Fla. Dist. Ct. App. 1994) (waiver of platting requirement in return for conveyance of right-of-way).

[66] *See, e.g., Northern Illinois Home Builders Ass'n* v. *County of Du Page,* 649 N.E.2d 384 (Ill. 1995).

[67] *Outdoor Systems, Inc.* v. *City of Mesa,* 997 F.2d 604 (9th Cir. 1993); *Manocherian* v. *Lenox Hill Hospital,* 643 N.E.2d 479 (N.Y. 1994).

[68] 505 U.S. 1003 (1992).

[69] 505 U.S. at 1019 n.8 (1992).

[70] *E.g., Florida Rock Industries* v. *United States,* 18 F.3d 1560 (Fed. Cir. 1994), *cert. den.,* 115 S. Ct. 898 (1995); *Creppel* v. *United States,* 41 F.3d 627 (Fed. Cir. 1994); *Bauer* v. *Waste Management of Conn.,* 662 A.2d 1179 (Conn. 1995); *Cannone* v. *Noey,* 867 P.2d 797 (Alaska 1994).

[71] 260 U.S. 393 (1922).

In addition, the "affected portion" language in this subparagraph is an important clarification of the law. Under current law, it is unpredictable whether the court will look to the affected portion of the property or the property as a whole. While some courts post-*Lucas* continue to apply "whole parcel" analysis in the context of determining whether developmental restrictions affect a total taking,[72] the trend is to reject this approach in order to protect reasonable investment-backed expectations by awarding compensation for the affected portion of property.[73] As with the partial takings uncertainty, the confusion over the parcel problem makes litigation more expensive and uncertain. By specifying a standard, the Committee believes that the law will be made clearer and thus more efficient for all involved.

Subparagraph (E) provides that new standards articulated in further takings rulings are automatically incorporated into this bill.

Subsection 204(b)

This provision guarantees that State and local governments cannot be sued under this title. Even where the State agency action qualifies for coverage under the bill pursuant to the definition of State agency in section 203, any takings claims arising from such action must be brought against the Federal agency which administers the relevant program. The Committee believes that this provision leaves no doubt that only Federal agencies have to litigate and pay compensation awards under this title.

Subsection 204(c)

This section places the burden of proof on the government with regard to subparagraphs 204(a)(2)(A), (B), and (C), while placing the burden of proof on the property owner for 204(a)(2)(D).

Subsection 204(d)

Paragraph (1) of this subsection is the nuisance exception to compensation. This provision states that under no circumstances shall compensation be required under this Act if the owner's use or proposed use of the property amounts to a nuisance, as understood by background principles of nuisance and property law in that State. Both the doctrines of public and private nuisance are encompassed within this provision. The Committee believes that under this exception regulations that help reduce or eliminate threats to public health and safety would not require compensation.

Paragraph (2) of this subsection defines the level of compensation owed to a successful claimant as the difference between the fair market value before and after the property became the subject of the agency action.[74] This provision also provides that, where it is appropriate, compensation shall include business losses.

---

[72] *See, e.g., Rivervale Realty Co.*, v. *Orangetown*, 816 F. Supp 937 (S.D.N.Y. 1993); *Hensler* v. *City of Glendale*, 876 P.2d 1043 (Cal. 1994).

[73] *See, e.g., Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Boise Cascade Corp.* v. *Board of Forestry*, 886 P. 2d 1033 (Or. App. 1994). A number of pre-*Lucas* decisions have refused to apply whole parcel analysis, *e.g., Corrigan* v. *City of Scottsdale*, 720 P.2d 528 (Ariz. Ct. App. 1985).

[74] The Committee is aware that it is possible for agency action to confer a specific benefit to a property owner, as well as a financial harm. Where this benefit is unique to the property owner and not merely the same benefit which the action conveys to the general public, the Committee believes it would be proper for the courts to consider the specific benefit as well as the

Subsection 204(e)

The subsection states that when compensation is paid for the taking of a property interest, the United States takes title of that interest. This prevents the possible problem of subsequent compensation for the taking of the same property right.

Subsection 204(f)

All awards for compensation are to be paid out of the budget supporting the agency action responsible for the taking. The Committee believes that requiring the agencies to pay for their own transgressions against the rights of property owners will make the agencies more likely to comply with the provisions of the Act. In short, it will hold them accountable.

This provision also stipulates that when there is cross-jurisdictional responsibility for the taking, the various agencies may seek appropriate reimbursement among each other. This guarantees that the proper agency will be held responsible.

Additionally, this subsection instructs that if there are insufficient funds to pay an award in the fiscal year the award becomes final, the agency must seek additional appropriations or pay the award from the next year's appropriation. Thus, compensation awards can only be paid from the responsible agency's appropriated budget. The Committee is certain that this provision forecloses any possibility that compensation awards would ever be paid from the Judgment Fund.

SECTION 205

Subsection 205(a)

This subsection clears the jurisdictional roadblock to a judgement in takings cases commonly known as the "Tucker Act Shuffle." The problem is eliminated by giving both the U.S. Court of Federal Claims and the United States District Courts concurrent jurisdiction to hear both claims for monetary and injunctive relief under this Act. Which court will hear the case is up to the plaintiff.

Subsection 205(b)

The Federal Circuit is granted exclusive jurisdiction to hear appeals of the cases described in 205(a). The Committee believes that this will provide uniformity of law and prevent forum shopping.

Subsection 205(c)

This subsection grants standing to any person adversely affected by an agency action as defined by this act.

Subsection 205(d)

This subsection amends the Tucker Act's grant of jurisdiction to the U.S. Court of Federal Claims so that it is in harmony with 205(a). It also repeals unnecessary provisions of 28 U.S.C. 1500.

---

harm for the purpose of calculating damages. *See Dolan* 114 S. Ct. 2039 (1994) (the Court considered, but rejected as nonexistent, various possible benefits to the property owner); *See also Armstrong* v. *United States*, 364 U.S. 40, 49 (1960) (the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness should be borne by the public as a whole.").

SECTION 206

The statute of limitations for claims under this title is 6 years from the date of the taking.

SECTION 207

In any case brought under this title, the court shall award attorneys' fees and costs to any prevailing plaintiff.

SECTION 208

This section reiterates that any State may add to the definition of property contained in this title.

SECTION 209

This title shall take effect on the date of enactment and shall apply to any agency action which occurs after that date.

Title III

SECTION 301

This section provides the opportunity for parties to resolve takings claims without resorting to litigation. It establishes a formal arbitration procedure, subject to the consent of both parties. The source of compensation and judicial review of the arbitration is identical to title II. The claimant has an election of remedies and is not required to pursue arbitration prior to other action.

Title IV

SECTION 401

This section sets forth the purposes of this title.

SECTION 402

This section defines several terms for the purposes of this title only.

SECTION 403

Subsection 403(a)

This subsection requires all agencies to complete a taking impact analysis before engaging in any agency action which is likely to result in the taking of private property. The issues that must be addressed by the statement are enumerated in this subsection. A number of exceptions to this requirement are also set forth. They include military or foreign affairs functions (not including the Army Corps of Engineers), immediate threats to health or safety, law enforcement, and other similar actions.

Subsection 403(b)

This subsection requires the Attorney General to assist agencies in complying with this section and to submit annual reports to the Office of Management and Budget listing each agency action for which a taking assessment was prepared, a takings claim filed, or compensation awarded.

Subsection 403(c)

This provision requires the agencies to make their taking assessments available to the public and to transmit copies of the analysis to the owners of the affected property.

Subsection 403(d)

For the purposes of judicial proceedings, this provision establishes a rebuttable presumption that a takings assessment is inaccurate if it has been unmodified for 5 or more years at the time of the proceeding. Thus, unless the presumption was rebutted, the takings assessment would not be reliable evidence for use in takings litigation.

SECTION 404

This section prohibits agencies from issuing new rules that reasonably could be construed to require uncompensated takings. Also, agencies are to review and, where appropriate, re-promulgate regulations that result in takings, submit budget requests that account for the payment of takings claims, and submit to Congress a list of statutory changes that the agency believes will help minimize takings.

SECTION 405

This section states that nothing in this title shall be construed to require exhaustion of remedies or to interfere with the property owner's right to a complete election of remedies. Nor is anything in this title to constitute a conclusive determination of the value of any property or any other material issue.

SECTION 406

The statute of limitations for the enforcement of the provisions of this title is 6 years after the date of the submission of the taking impact analysis.

Title V

SECTION 501

This section states the findings and purposes for this title.

SECTION 502

This section defines several terms for the purposes of this title.

SECTION 503

This section requires agencies to conduct the implementation and enforcement of their statutory missions without violating local law. Agencies are to minimize any disturbances of private property rights. The agencies are instructed to develop rules to ensure that these requirements are properly implemented.

SECTION 504

This section forbids agencies from trespassing on private property to collect information. If the property owner consents to the

agency's presence and is supplied with the data collected, the agency may enter the property.

SECTION 505

This section forbids the use of information gathered as a result of entrance onto private property unless the property owner is supplied with the information, a description of how it was collected, and an opportunity to dispute the accuracy of that information. If such a challenge is raised, the agency may not base agency action on that information unless the agency determines the information to be accurate.

SECTION 506

This section amends 33 U.S.C. 1344 (section 404 of the Clean Water Act). The amendment provides a right to an administrative appeal of certain agency actions regarding the delineation of a parcel of land as a protected wetland, permits, and penalties. The agency is required to adopt procedures to hear such appeals. Certain requirements concerning the location and procedures of the hearing are also specified. Property owners who proceed under this provision are still entitled to pursue a takings claim in Federal court.

SECTION 507

This section amends 16 U.S.C. 1540 (section 11 of the Endangered Species Act) to provide for an administrative appeal of agency action regarding the determination of a parcel of land as a critical habitat of a listed species, permits, incidental "take" statements, and penalties. The agency is required to adopt procedures to hear such appeals. Certain requirements concerning the location and procedures of the hearing are also specified. Property owners who proceed under this provision are still entitled to pursue a takings claim in Federal court.

SECTION 508

This section provides for compensation for the taking of private property. The claimant retains the election of remedies and may pursue a claim under section 204 of this Act. This section further provides for a formal compensation negotiation between the property owner and the agency. If no agreement can be reached, the property owner may submit the matter for binding arbitration. The agency selects the arbitrator from a list obtained from the American Arbitration Association. In any case where compensation is made, payment shall be supplied by the funds supporting the agency action that gave rise to the claim.

SECTION 509

This section amends 16 U.S.C. 1535 (section 6 of the Endangered Species Act) to require the agency to provide notification of and an opportunity for participation in management agreements for all property owners whose property is the subject of that agreement.

SECTION 510

This section explicitly states that a claimant need not exhaust administrative remedies to proceed under this Act nor are any other titles conditions precedent to proceeding under this title. Further, nothing in this title bars a claim under 28 U.S.C. 1346 or 1402 or chapter 91. Finally, nothing in this title shall constitute a conclusive determination of the value of property or any other material issue.

Title VI

SECTION 601

This section states that if any portion of this Act is held to be unconstitutional, the remainder of this Act shall not be affected.

SECTION 602

This section states that, except as provided in this Act, the provisions of this Act shall take effect on the date of enactment and shall apply to any agency action after such date.

V. COST ESTIMATE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, March 8, 1996.

Hon. ORRIN G. HATCH,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 605, the Omnibus Property Rights Act of 1995.

Enacting S. 605 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 605.
2. Bill title: Omnibus Property Rights Act of 1995.
3. Bill status: As ordered reported by the Senate Committee on the Judiciary on December 19, 1995.
4. Bill purpose: S. 605 would prohibit federal agencies (or state agencies, if carrying out a federal program) from taking private property without paying just compensation to the owner. The bill would establish specific conditions, definitions, and standards to be used in determining when an agency action has caused a taking of private property and what compensation is due to the owner.

Two titles of this legislation would make it easier and less expensive to pursue claims for compensation against the United States. First, Title II would establish a statutory right to judicial redress

that may be used by owners to sue the government when property rights have been taken by the activities of a federal (or authorized state) agency.

Second, Title V would establish special rules for resolving property rights disputes that involve federal programs carried out under the Endangered Species Act (ESA) and section 404 of the Federal Water Pollution Control Act (FWPCA). This title would amend the two statutes to provide landowners with a right to appeal and/or seek compensation for agency actions through a new administrative process.

Other provisions of the bill would attempt to reduce the number of takings caused by federal regulatory actions. Such provisions would require agencies to consider and minimize the effects of their actions on private property rights. For example, Title IV would require agencies to conduct impact analyses before taking actions that are likely to affect private property. Agencies could not promulgate final rules that would result in uncompensated takings. Where existing regulations are found to be in conflict with the new law, agencies would have to issue new regulations. Similarly, Title V would require agencies to administer programs carried out under the ESA and FWPCA in a manner that has the least impact on the rights of property owners.

Finally, the bill would require that all compensation payments to property owners be paid from funds appropriated to the agency that caused the taking. This would be true for all payments (including any awarded interest and cost reimbursements), whether determined by court judgment, settlement, arbitration, or administrative decision.

5. Estimated cost to the Federal Government: Implementing S. 605 would involve two types of federal expenditures: (1) payments of compensation to property owners, and (2) operating and administrative expenses incurred by federal agencies.

Payments of Compensation. CBO expects that additional compensation costs over the next few years would probably be less than the additional administrative costs (discussed below) because most of the cases that would be resolved during this period would be small administrative claims involving minor dollar amounts. CBO has no basis for estimating the additional amounts of compensation that the government might have to pay for cases where property owners choose to pursue larger claims in court.

Administrative Costs. Assuming appropriation of the necessary amounts, CBO estimates that federal agencies would spend an additional $30 million to $40 million a year over the next five years to implement and operate the administrative appeals and claims procedures prescribed by Title V. After this period, ongoing administrative expenses would probably fall considerably, although they would remain above the current annual costs of $110 million to $125 million to carry out the affected regulatory programs.

Other administrative costs to comply with Title IV, which requires federal agencies to review existing regulatory actions and analyze proposed ones for their impacts on property rights, depend greatly on how agencies interpret their responsibilities under the bill. However, for most agencies, we expect that such costs would

not add significantly to the cost of conducting similar assessments under current law or administrative policies.

6. Basis of estimate: *Payments of Compensation.* In the first few years following enactment of S. 605, additional compensation costs resulting from the legislation would probably account for a relatively small portion of each affected agency's operating budget because few claims would be paid over this period and those that would be paid would typically involve small awards. The cost of compensating property owners in the longer run is very uncertain and would depend on a number of unknown factors, including how property owners and federal agencies would react to the legislation and how the legislation would be interpreted by the Administration and the courts.

CBO expects that enacting the bill would cause federal agencies to attempt to avoid paying compensation by modifying their decisions, processing permits more quickly, or otherwise changing their behavior. Although the number of small claims brought against the United States could increase dramatically—especially since so few are made under existing law—those that are paid would involve small awards. We expect the increase in the number of large claims to be much less significant, because most such claims would probably have been brought anyway and would still require litigation, but the bill could increase the chances of success for those who choose to litigate.

Compensation under Current Law. Under existing law, persons who wish to seek compensation for property that they believe has been taken by a government action usually must do so through litigation—generally in United States Court of Claims. The process is time-consuming and expensive. Property owners who bring suit in the Claims Court typically wait at least two years before their cases are heard. Decisions unfavorable to the government have been rare in the past because of the high loss thresholds required by precedent before the courts will award compensation. Property owners who pursue their cause can expect the government to appeal unfavorable decisions, which often adds years to the process. Because the legal and other costs of waging a protracted court battle are greater than most property owners can afford, relatively few compensation claims are brought against the United States (although there has been a steady increase in the last decade). Those cases that are brought typically involve relatively large claims (more than $100,000, to more than $100 million) brought by corporations or other large property owners. Such claims can require more than a decade to resolve. As a result, the few awards that are paid often include more for interest and reimbursements of litigation costs than for compensation.

Compensation Under S. 605. CBO expects that the vast majority of new compensation claims resulting from this bill would be brought under the administrative process prescribed by Title V. Although the number of such claims could be quite large at first, we expect that relatively few would result in payment because:

- the bill's effective dates, definitions, and other provisions would probably allow agencies to reject a large portion of early claims (such as those involving pending or pre-enactment agen-

cy decisions) by deeming them to be outside the scope of the bill;

- the requirements that compensation payments be made from agency appropriations would cause the agencies to try to resolve as many claims as possible without having to pay any compensation—for example, by reversing or modifying permit decisions or enforcement actions, by processing permit applications more quickly, and by working more closely with landowners to negotiate permit conditions; and
- the 33 percent threshold established by the bill for determining whether a taking has occurred would probably be too high to allow property owners affected by many agency actions to recover. Especially for agency actions that apply to an area generally (such as those taken under the ESA), the overall percentage of value lost on an affected property typically would be small.[1]

Further, we estimate that any compensation payments eventually made through the administrative process would involve relatively small amounts (often as little as a few thousand dollars), largely because small claims would account for the vast majority of claims likely to be made under this title. Most of the actions that would lead to successful claims under this title (such as decisions on permit applications) involve either very small land parcels or some minor fraction ("affected portion") of larger tracts.[2] Moreover, we believe that property owners with large claims would be very unlikely to seek compensation under Title V. Because disputes involving large claims almost always involve complicated technical and valuation issues, they would be much more difficult to resolve under the simple administrative procedures established by Title V. Also, the administrative and binding arbitration processes prescribed by this title do not specifically allow claimants to receive interest on their awards or be reimbursed for legal and other costs. Consequently, it would be very risky for owners with large claims to proceed under Title V. Such claims (which are often brought by corporations and others who have sufficient resources to sue the federal government) would probably continue to be resolved through litigation.

CBO expects that new claims for compensation also would be brought under the right to judicial relief established by Title II of the bill, although we expect that any budgetary impact resulting from new litigation would take several years to be felt. Title II specifies the events and conditions that constitute a compensable taking of private property, and the standards to be used in calculating just compensation. Compensation awarded under this title would include compound interest calculated from the date of the

[1] For example, an individual species listing and/or habitat determination under the ESA can affect thousands of properties ranging in size from single residential lots to major timber holdings, most of which are likely to experience some overall reduction in market value across the property as a whole. In most cases, however, the average diminution in property value (or business loss, in terms of new compliance costs) would be well below the 33 percent threshold.

[2] For example, of the types of section 404 permit decisions that are likely to result in compensation claims, about one-half involve fill sites of less than one acre, and as many as 75 percent involve less than five acres. Even if the Corps had to treat each such denial as a 100 percent loss of value for the entire fill acreage, most payments would be minimal. Moreover, a significant number of section 404 permit decisions cover fill sites that could be too small either to reduce the owner's total holding by 33 percent or to have any market value independent of the property as a whole.

taking until payment and reimbursement for litigation costs, including legal expenses and expert witness fees.

Enactment of Title II probably would increase the number of lawsuits brought against the United States, at least in the short run. CBO expects that the majority of the new suits would involve relatively large claims against agencies that regulate the use of land or water, particularly the U.S. Army Corps of Engineers and the Department of the Interior (DOI). The impetus for most of these claims would be the new statutory conditions for identifying a compensable loss.

Even if the government would ultimately lose more lawsuits as a result of the legislation, additional compensation costs would probably be minimal in the 1996–2000 period because claims would take several years to resolve. Large claims brought under Title II would still involve many of the same factors that prolong litigation under existing law, including a lengthy discovery period, court delays, and valuation disputes. Moreover, in the early years many new claims would likely involve conflicting interpretations of the statute that could take a number of years to resolve through the judicial process.

The effect of Title II on federal compensation costs in later years would depend on the outcome of this process and is very difficult to predict. On the one hand, it is likely that the legislation's 33 percent loss threshold and related provisions would cause property owners to bring—and possibly win—more suits than in the past. On the other hand, the requirement that agencies pay all compensation awards, including compound interest and reimbursements of costs, from their operating budgets could have the effect of limiting potential costs under this title. We expect that this requirement would encourage most agencies to avoid actions that would cause property owners to sue, to the greatest extent allowed by applicable law.

Administrative costs

Over the first few years following enactment, the major impact of S. 605 would be on federal administrative costs incurred to implement and carry out Title V. This title would direct the Corps of Engineers, the Environmental Protection Agency (EPA), and the U.S. Fish and Wildlife Service (USFWS) to institute administrative appeals procedures to allow property owners to request a review of agency decisions on wetlands and endangered species matters.[3] Property owners could also seek compensation administratively, if a final agency action deprives them of 33 percent or more of their property's value or economic use.[4] Under current law, property owners must pursue both types of requests through litigation.

CBO estimates that federal costs to administer the two affected statutes as amended by Title V would be significantly greater than under current law, at least in the first few years following enact-

[3] The appeal and compensation provisions of this title would apply to a broad range of regulatory, enforcement, and conservation activities carried out under the two acts, including: (1) actions that apply to individuals or groups of property owners, such as permits to fill wetlands under section 404 or incidental take permits issued under the ESA, and (2) general, area-wide actions that affect more than one property owner, such as listings of endangered or threatened species and designations of their critical habitat under the ESA.

[4] As defined by Title V, "property" includes water rights, land, and related interests.

ment of the legislation. During this initial period, addressing previous harms to property owners would account for the lion's share of new expenses. In order to take advantage of the administrative appeal and compensation provisions of S. 605 (which would apply only to agency actions that take place after enactment), persons affected by past government actions would have to apply or reapply for permits to obtain a new agency decision. As a result, the affected agencies would probably experience a one-time flood of such requests beginning soon after enactment. Processing applications and reapplications would require the agencies to revisit hundreds of old decisions made over the years since the two statutes were enacted. Moreover, once the resubmitted permits have been processed, each unfavorable decision could form the basis of an appeal and/or compensation claim that also would have to be resolved.

The Corps of Engineers would probably incur most of the additional workload because it processed the vast majority of individual permits that would likely be resubmitted as a result of this bill. Moreover, we would expect relatively few landowners affected by previous ESA determinations to take advantage of the appeals and claims provisions of Title V because in order to do so they would probably have to apply for an incidental take permit and obtain an unfavorable decision from the FWS. Incidental take permits, which must be obtained in order to develop land subjects to ESA regulations, are very expensive and time-consuming for the average small landowner to pursue.

Depending on how quickly the reapplications arrive and what priority the agencies give them, processing permits and other requests related to these previous actions would add $15 million to $20 million annually to the cost of wetlands and endangered species programs in the short run.

In addition to these amounts, federal agencies also would incur new annual expenses to process administrative appeals of decisions made after enactment of the bill. Most of the additional costs of processing appeals would be incurred by the Corps under the section 404 wetlands program because it makes the greatest number of decisions that are likely to result in such requests in any given year. CBO estimates that the agency would spend about $12 million annually to process appeals under Title V, or about twice as much as the $6 million requested for a similar (but more limited) administrative relief system proposed by the President in the fiscal year 1996 budget submission. The cost of the ESA appeal process would probably be much less—about $3 million annually—because the USFWS issues far fewer decisions each year and would be able to consolidate individual appeal of many of its decisions.

Also, beginning in 1997, both agencies would incur new costs to process compensation requests. CBO believes that the majority of such claims would stem from the creation of an administrative forum, which would provide most property owners with a cost-effective way to seek compensation. Typically, persons affected by wetlands and endangered species regulations are small landowners who often cannot afford to sue the federal government or who would not expect to receive enough compensation to justify the substantial expense of attorneys and experts. Thus, without the administrative claims process prescribed by Title V, most of these

people would not be able to take advantage of the 33 percent loss threshold or other standards established by the bill that might increase a landowner's chance of prevailing against the government.

We estimate that annual costs to process compensation claims would be about $1 million or $2 million for the first few years after enactment,rising to about $5 million by about 2000. About half of these amounts would be spent by each of the two agencies.

In addition to these costs, some federal agencies may incur increased administrative expenses to carry out Title IV of the bill. Title IV would require all agencies to conduct takings impact analysis (TIAs) on proposed policies, regulations and legislation. Agencies would submit each TIA to the Office of Management and Budget as a part of any required regulatory impact analysis. Agencies would also have to review existing regulations and, for those found to result in the taking of private property, revise them in a manner that reduces such takings to the maximum extent possible.

Under Executive Order 12630, dated March 15, 1988, all federal agencies are already required to evaluate the potential effects of their regulatory actions on private property rights. The information required by that order is very similar to that which agencies would have to submit under Title IV, including estimates of potential federal liability. Based on information obtained from several regulatory agencies, CBO expects that the TIAs conducted under Title IV would be very similar to those done under existing policy in both content and the level of effort required. As under current policy, most agencies would conduct these analyses for actions that directly affect private property (for example, permit denials), with relatively few performed for broader actions (such as proposed legislation or regulations that affect the nation as a whole). Depending on whether agencies interpret Title IV as being more stringent than current law, the bill's specific loss threshold and definition of private property may induce some to conduct TIAs for more actions than they do currently. Because the level of effort for such analyses would continue to be minimal for most types of actions, however, we estimate that the additional costs involved would be minor.

Similarly, we expect that the requirement that agencies review existing regulations would probably be interpreted by most regulators to involve very few past agency decisions that directly affect the right to use property (for example, prohibitions on mining or other commercial activities in certain areas). As a result, the effort required of most agencies to carry out this exercise would be minimal—particularly compared to that needed for more general, comprehensive reviews such as those conducted under the Administration's regulatory reform initiative in 1995.

7. Pay-as-you-go considerations: None.

8. Estimated impact on State, local, and tribal governments: S. 605 contains no intergovernmental mandates, as defined in Public Law 104–4, that would impose any direct costs on state, local, or tribal governments.

9. Estimated impact on the private sector: S. 605 contains no private sector mandates as defined in Public Law 104–4.

10. Estimate comparison: None.

11. Previous CBO estimate: On October 17, 1995, the Congressional Budget Office prepared a cost estimate for S. 605, as intro-

duced on March 23, 1995. This estimate provides more information about anticipated administrative costs than the earlier one, but the two versions of the bill are very similar and the estimated costs have not changed.

12. Estimate prepared by: Deborah Reis.

13. Estimate approved by: Robert A. Sunshine (for Paul N. Van de Water, Assistant Director for Budget Analysis).

VI. Regulatory Impact Statement

Pursuant to paragraph 11(b), rule XXVI of the Standing Rules of the Senate, the Committee, after due consideration, concludes that S. 605 will have significant regulatory impact.

VII. SUPPLEMENTAL VIEWS OF SENATOR GRASSLEY

OMNIBUS PROPERTY RIGHTS ACT—S. 605

The Omnibus Property Rights Act is extremely important to the people of my state. In Iowa, over 98 percent of the land is privately owned. Only three other States have a higher percentage of privately held land. So virtually every government regulation in some way affects the ability of Iowa landowners to use their property.

The people have grown tired of the increasing regulatory encroachment on their everyday lives and on their property rights. The plea I hear most often when I return to Iowa is "Get the government off our back." I hear this from ordinary citizens—the small family farmers and the small business owners. This bill is vital for these people—it is not merely a way to relieve the regulatory burden on big business as the opponents of this bill would have you believe.

It is also not a bill that will roll back environmental laws or pay industries to keep them from polluting. It addresses real problems, faced by real people.

In my State, one of the most common encroachments on an individual's property rights occurs due to the Federal wetlands regulations. My office is currently involved in several cases where small, family farmers are being deprived of the right to farm their land because of the presence of a wetland.

In most instances, the land has been farmed by the same family for many generations. And in some instances, it is very questionable whether a wetland exists on the land at all.

These cases illustrate that we have a bureaucracy characterized by overlapping jurisdiction, where one official can authorize an action that another will condemn you for later. This is a complete lack of common sense in administrating the law.

Second, the cases show that Federal regulations affecting private property in most instances impact average Americans. It is not the large manufacturers and agribusinesses that need the protection from government overreaching. They have the resources, in terms of money, time and legal advice to go to court and defend a governmental action. The average citizen does not.

This bill helps address many of these concerns in the following ways. It generally codifies the existing judicial standards for proving a takings case. In addition, the bill provides relief to landowners whose property value is diminished by at least 33 percent. This bright-line standard will benefit the small landowner by bringing some clarity to the case law. This gives guidance to aggrieved landowners as to the likelihood of their case succeeding, thereby preventing frivolous lawsuits.

The bill provides for compensation to landowners whose property is taken or devalued by 33 percent. It also forces agencies to ana-

lyze proposed regulations as to the likelihood that the regulation will result in a taking. And finally, the bill makes it easier for aggrieved landowners to seek remedy from the government in Federal court.

Simply stated, the legislation strikes a balance between the public good and the desire to protect private property rights. Currently, the deck is stacked in favor of the government and against property owners.

Opponents of the bill argue that the Constitution already protects the rights of private property owners in the 5th and 14th amendments. However, for the reasons pointed out in the hearing testimony of Chief Judge Smith, a petitioner seeking to invoke these constitutional protections faces both jurisdictional and procedural hurdles that are not easily overcome. In fact, the Congressional Research Service reports that of 31 Federal court decisions on the takings issue in 1993, only 2 were decided in favor of the property owner.

Moreover, litigation under the Takings Clause is generally more expensive and time-consuming than other types of litigation because of its fact-intensive nature and lack of clear judicial standards. Thus, many aggrieved landowners are effectively barred from a judicial remedy due to the cost and time involved in trying their case. This proposed legislation sets a clear standard, eliminates jurisdictional hurdles and expedites the process in favor of the landowner who has suffered a taking.

The bill also will force agencies to consider whether their actions affect the use of private property. This requirement will result in more innovative regulations that both promote the public good and limit the infringement of the government on property rights.

This bill does not turn back the clock on the gains we have made in the last two decades in improving the environment. Critics of this legislation argue that the government will be forced to pay polluters to comply with environmental law, thus rewarding so-called "bad actors." This is simply not the case. No compensation will be paid for activity that constitutes a common-law nuisance.

In closing, this bill is sorely needed to bring back some common sense to the way agencies promulgate and enforce regulations. It is also needed to give the aggrieved landowner a fighting chance against a government that has failed to uphold the sanctity of private property rights.

CHUCK GRASSLEY.

VIII. ADDITIONAL VIEWS OF SENATOR HEFLIN

COURT OF FEDERAL CLAIMS PROVISIONS OF S. 605

The Court of Federal Claims (the "Court") is the American citizen's primary judicial forum for resolving general disputes with the Federal Government over money and property including disputes involving certain tax cases (28 U.S.C. 1507–1509), contracting (28 U.S.C. 1491), regulation of property (28 U.S.C. 1491), patent use (28 U.S.C. 1498), military personnel (28 U.S.C. 1491), cases under the Contract Work Hours and Safety Standards Act (28 U.S.C. 1499), Indian tribes (28 U.S.C. 1505), and others relating to agricultural matters, transportation services, and childhood vaccination programs.

One of the provisions relating to the Court of Federal Claims addresses a problem relating to a split in jurisdiction between the Court (which can provide a monetary remedy under the Tucker Act of 1887) and the article III U.S. district courts (which can provide equitable or injunctive relief under the Administrative Procedure Act of 1946).

The split between equitable and monetary remedies requires a citizen to sue the Federal Government in two separate courts to obtain full relief in what is in reality one case or cause of action.

Current law requires a citizen to consecutively bring a suit against the Federal Government in district court to challenge the propriety of an administrative decision or regulation relating to a takings case. After all appeals have been exhausted, the citizen must then file a suit in the Court of Federal Claims seeking monetary relief.

Section 205(a) confers concurrent jurisdiction upon the Court and the district courts to resolve cases arising under the Property Rights Act. This provision would make complete relief against the Federal Government available in one forum. It would make it easier and quicker to resolve taking cases and cut litigation costs on behalf of the taxpayer and the Federal Government.

Section 205(b) provides that any appeals arising from either the Court or the district courts will be decided exclusively by the Court of Appeals for the Federal Circuit in order to provide consistency and uniformity on questions of law.

Section 205(c) provides that persons adversely affected by an agency action under this act shall have standing to challenge such agency action.

Section 205(d) amends 28 U.S.C. 1491 to clarify the grant of concurrent jurisdiction provided in section 205(a). Section 205(d) also authorizes the Court to grant injunctive and declaratory relief where appropriate in cases within its jurisdiction, to grant ancillary tort jurisdiction in cases within its jurisdiction, and repeals 28

U.S.C. 1500, which prohibits the Court from hearing any claim which a plaintiff has pending in another court.

John Schmidt, Associate Attorney General, U.S. Department of Justice, testified before the Committee on these provisions and stated that they would "expand" the jurisdiction of the Court by giving it the authority (1) to invalidate acts of Congress that adversely affect property rights; (2) to decide all claims against the Federal Government for monetary relief, including those concerning the proper interpretation of statutes and regulations that are currently determined by district courts; (3) to grant injunctive and declaratory relief when appropriate in any case within its jurisdiction; and (4) to consider related claims brought under the Federal Torts Claim Act. (Written statement of Associate Attorney General John Schmidt, April 6, 1995, at pages 24–25.)

The term "property rights" in the provisions of section 205 limits the Court's jurisdiction to addressing violations of those specific rights and provides the Court with the remedial tools to give complete relief in all cases that are within the Court's jurisdiction. These provisions eliminate remedial barrier that currently may cause a citizen and the Federal Government to litigate the same or related claim in two courts.

Associate Attorney General Schmidt's testimony before the Committee raises concerns about "blurring" the distinctions between article I courts (such as the Court of Federal Claims) and article III district courts stating "we do know that these changes will give an Article I court the power for the first time to invalidate an act of Congress." (Schmidt, written statement at page 25.)

The distinction between article I courts and article III courts is, however, quite clear. Article III courts are established to adjudicate private right suits where one private party sues another private party, or where the government sues a private party. However, in contrast, article I court jurisdiction may be exercised over the whole area of public rights which are suits brought by a private citizen against the Federal Government. These suits have been called suits about public rights because there was no right at common law to sue the government (or sovereign). Thus, when the Federal Government waives its sovereign immunity to allow such a suit, the government can set the conditions under which the suit can be brought. For example, the Federal Government can require that a suit be brought in an article I court or it can require that the suit be tried without a jury.

With respect to the issue of whether an article I court has the power to declare an act of Congress or regulation unconstitutional, the answer is clearly in the affirmative. Each Federal judge has the inherent authority and duty to disregard unconstitutional statues and regulations. This principle was first enunciated in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803). Article I judges are appointed by the President, confirmed by the Senate for a 15-year term, and take the same oath of office as article III judges. They have the same duties as article III judges in cases within their jurisdiction.

For example, suppose a statute or regulation stated that members of a particular religion or ethnic background could not bring a takings case and, further, suppose that the Federal Government

raised as an affirmative defense that particular statute or regulation. Surely, there could be no question that a judge on the Court of Federal Claims had the inherent authority to address the constitutionality of such a statute or regulation.

Freytag v. *Commissioner of Internal Revenue,* 501 U.S. 868 (1991) is the Supreme Court's most recent pronouncement on the nature of article I court jurisdiction. *Freytag* was a case dealing with the special trial judges of the article I tax court, which is similar in structure and function to the Court of Federal Claims. The *Freytag* case holds that article I courts exercise the judicial power of the United States. The Supreme Court stated:

> Our cases involving non-Article III tribunals have held that these courts exercise the judicial power of the United States. In both *Canter* and *Williams,* this Court rejected arguments similar to the literalistic one now advanced by petitioner, that only Article III courts could exercise judicial power because the term "judicial power" appears only in Article III of the Constitution. In *Williams,* this Court explained that the power exercised by some non-Article III tribunals is judicial power. [*Freytag* at p. 898.]

The Supreme Court further quotes from *Williams* v. *U. S.*, 289 U.S. 553, at 565–567 (1933), which found the Court of Federal Claims to be an article I court which exercised judicial power.

In the recent case of *I.B.M. Corporation* v. *U.S.*, 59 F.3d 1234, *cert. granted* (8 Dec. 95) (No. 95-591), the Court of Appeals for the Federal Circuit affirmed a ruling by the Court of Federal Claims which had declared a Federal tax statute (28 U.S.C. 4371) unconstitutional. Neither before the Court of Appeals for the Federal Circuit nor in its petition for a writ of certiorari before the Supreme Court did the Federal Government contest the jurisdiction of the Court of Federal Claims to adjudicate the constitutionality of the tax statute at issue. Thus it appears abundantly clear that article I courts exercise judicial power and have the power to declare acts of Congress and regulations unconstitutional in those cases within the courts' jurisdiction.

As noted previously, in section 205(d)(1)(B), in cases within its jurisdiction, the Court of Federal Claims shall have the power to grant injunctive and declaratory relief when appropriate. The Court currently has such powers in 40 percent of its cases. These include contract, tax, military and bid protest cases. Article I courts (territorial courts, District of Columbia Superior Court, and the Courts of Appeals for the Armed Forces) have long exercised such powers in cases which can result in imprisonment or in the death penalty. It does not appear that remedial power of the Courts with respect to these cases has created any constitutional problems, nor should they with respect to the Court of Federal Claims in takings cases.

Section 205(d)(1)(C) provides that, in cases otherwise within its jurisdiction, the Court of Federal Claims shall also have supplemental jurisdiction to render judgment upon any related tort claim authorized under the Federal Torts Claim Act, 28 U.S.C. 2674.

This provision does not provide general Torts Claim Act jurisdiction which is exercised by the district courts. It provides ancillary

jurisdiction when a related tort claim may be deemed to have arisen from the same operative facts as the primary claim within the court's jurisdiction. This provision will most frequently find application on contract or takings claims when the factual context gives rise to ancillary tort claims. For example: where a plaintiff sues the Federal Government for breach of contract and the facts show that the government may have negligently (or willfully) destroyed a plaintiff's equipment used to work on a project. For example: where a plaintiff sues the Federal Government in a takings case alleging hazardous wastes poisoned the ground water and the ancillary tort of trespass is also alleged.

In each of these instances, this new provision would give the Court of Federal Claims jurisdiction to decide an ancillary tort claim and dispose of the case in one forum, thereby avoiding wasteful and duplicative litigation.

Section 205(d)(1)(C) also provides that, in proceedings within the jurisdiction of Court of Federal Claims which constitute judicial review of agency action, the provisions of section 706 of title 5 shall apply. This provision makes clear that in cases which constitute judicial review of administrative agency action, the Administrative Procedure Act standards set forth in 5 U.S.C. 706 shall apply.

Despite a long history of applying the judicial review provisions the Administrative Procedure Act, two recent decisions of the Court of Appeals for the Federal Circuit have confused matters. *Mitchell* v. *U.S., 1 F.3d 1252 (Fed. Cir. 1993)* [military pay case; review of decision of Board for Correction of Military Records]. Also, *Murphy* v. *U.S.*, 993 F. 2d 871 (Fed. Cir. 1993) [military pay case; review of decision of Board for Correction of Military Records]. The inclusion of this provision will end any doubt and confusion regarding the Court's authority to apply the judicial review provisions of the Administrative Procedure Act.

Finally, section 205(d)(2)(A) repeals 28 U.S.C. 1500 which bans the Court of Claims from hearing any claim which a plaintiff has pending in another court. This is known as the Tucker Act "shuffle."

The split between legal and equitable remedies requires a plaintiff to sue in two separate courts in order to obtain full relief in what is really one case. Section 1500 bans a plaintiff from seeking a monetary remedy while a suit is pending in another court seeking an equitable remedy.

Thus, if a plaintiff files suit in one court, by the time appeals have been exhausted, the statute of limitations may have run on the remaining portion of his claim subject being adjudicated in the other court. The current statutory regimen of requiring a citizen to file a suit for equitable relief in the district courts and for monetary relief in the Court of Federal Claims is expensive, time-consuming, and of no benefit to anyone but the government. The repeal of section 1500, in conformity with section 205(a), would make complete relief against the Federal Government available in one forum.

HOWELL HEFLIN.

IX. MINORITY VIEWS OF SENATORS BIDEN, KENNEDY, LEAHY, SIMON, KOHL, FEINSTEIN, AND FEINGOLD

"* * * nor shall private property be taken for public use, without just compensation."

With these few words, our Constitution enshrines the right to own property as fundamental, an American birthright and privilege. To own, enjoy and develop private property is a right central to our Nation's economic vitality, and central, even, to our national identity.

And so it is that the fifth amendment promises that if the government takes your property, it must pay you. And it must pay you fairly.

On these principles we can all agree. In fact, it is on these very principles that we base our *opposition* to S. 605—for we believe that the bill creates sweeping new entitlements for a few property owners, at the expense of the vast majority of Americans who rely on our nation's environmental, health, safety, fiscal and civil rights laws to protect *their* property interests and *their* quality of life.

Most Americans live downstream, downwind, or down the road from other property owners. We all count on each other to be good neighbors—for it is clean water, fresh air, and safe land management that makes our property valuable and secure.

S. 605, we believe, will allow some property owners to be bad neighbors. And it will face our Nation with two equally untenable options. Either we will have to cut back on the environmental, health, safety and civil rights protections that add value to our property and lives—or we will have to pay our neighbors to do the right thing: we will have to pay employers not to discriminate, pay companies to ensure worker safety, and pay manufacturers not to dump their waste into our rivers and streams. Either way, the vast majority of Americans will lose.

We do not quarrel with the emotions that drive this bill. All Americans should be free from unreasonable, irrational and nonsensical regulatory restrictions on their property. And we do not dispute that such regulations are sometimes promulgated, and that real people suffer real economic harm as a consequence.

We should right such wrongs. Where a Federal program treats property owners unfairly, we should fix it—either as it is being implemented in specific cases, or, if necessary, more generally. Indeed, the Clinton administration has gone to great lengths to lift a number of regulatory burdens on private property, especially as to smaller property owners. Regarding the Endangered Species Act, for example, the administration has issued a new policy which presumptively exempts from the Act single family homeowners with five or fewer acres of land. Similarly, for wetlands programs, the Army Corps of Engineers has provided new exemptions for owners

of smaller parcels containing wetlands, and allowed for greater flexibility even for large wetland areas.

We must be ever vigilant against regulatory abuses, and we must forge ahead with needed reforms. But we should not, as Justice Blackmun once said, "launch a missile to kill a mouse."[1] We believe that S. 605 would do just that—for it quite radically departs from over a century of constitutional thinking in this area, and poses a direct threat to the property, health and safety interests of most Americans.[2]

Our objections to S. 605 are many. We here briefly summarize:

- Contrary to longstanding Supreme Court precedent—which aims to strike a fair balance between the interests of property owners, their neighbors and the community at large—S. 605 provides a mechanical, "one size fits all" rule of compensation. A property owner would be *entitled* to payment where a government action devalued *any portion* of his property by 33 percent—without a fair regard for the interests of others, and without regard for his legitimate expectations.
- S. 605 would be prohibitively expensive—costing the taxpayers in excess of $28 billion over the next 7 years. It would also generate a mountain of costly and time-consuming litigation, diverting scarce judicial resources from many other meritorious claims.
- S. 605 would require an elaborate takings impact analysis before the government takes even the most minor of regulatory actions. Although we agree that agencies should certainly take into account the impact of their regulations, we believe this provision would bring necessary protections for the public to a standstill, and channel scarce resources into bureaucratic paperwork.
- S. 605 prohibits Federal agencies charged with protecting wetlands and endangered species from entering a property owner's land to collect environmental data without consent—even in the case of an emergency or when criminal activity is suspected.

---

[1] *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1036 (1992) (Blackmun, J., dissenting).

[2] In explaining the need for this legislation, the majority tells a series of stories of regulatory insensitivity or wrongheadedness. Although we have not investigated each case, and although we, again, do not mean to dismiss any hardship suffered, we simply note that there are often two sides to every story. For example, the majority tells of the McMackins of Pennsylvania and their wetlands dispute with the Army Corps of Engineers. We understand, however, that the McMackins filled in their wetland—which provided important flood control and wildlife habitat—without applying for the requisite authorization. When the Corps learned of the McMackins' actions some 4 years later, it did not (contrary to the majority's suggestion) seek any monetary or criminal penalties. Instead, the Corps allowed the McMackins to file for the necessary permits after the fact, agreed to waive important legal requirements, and worked closely with them to mitigate the environmental damage caused by their actions. Moreover, as mentioned above, the Corps has recently issued a new nationwide wetlands permit, under which landowners like the McMackins may now fill up to half an acre of wetlands without need for an individual permit.

The anecdote, we also suggest, is a genie with two masters. The Committee heard testimony from John Chaconas of Louisiana, who moved into his home after the previous owner had illegally filled in about eight acres of surrounding wetland. As a result, the Chaconases not infrequently find themselves ankle deep in water and mud 10 feet from their front door; one of their neighbors cannot access his property whenever it rains, and another's pecan trees have been inundated with water. To the Chaconases, it is not too much—but too little—wetlands enforcement that has devalued their property. "What is wrong here is not wetland policy gone awry," Mr. Chaconas testified, "but the arrogant belief that some can do whatever they want with their property and all others be damned." (Written statement of John and Cynthia Chaconas, Apr. 6, 1995, at 3.)

As we explain below, S. 605 would do far more harm than good to the property rights, and quality of life, of the great majority of Americans. In the words of President Clinton, who has promised to veto S. 605 or similar compensation entitlement legislation:

> Though styled as an effort to protect private property, a goal which I strongly support, S. 605 does not protect legitimate private property rights. The bill instead creates a system of rewards for the least responsible and potentially most dangerous uses of property. It would effectively block implementation and enforcement of existing laws protecting public health, safety, and the environment. (Letter from President Clinton to Chairman Hatch, December 13, 1995.)

I. The Compensation Provisions: Paying People to Obey the Law

A. S. 605 stands our nation's property rights tradition on its head

The fifth amendment says that the government cannot "take" our property for public purposes without paying compensation. It does *not* say, however, that the government is powerless to regulate property for the community good—or that any time it does so, taxpayers must compensate the affected property owner.

To the contrary: it has long been considered one of government's chief responsibilities to regulate property use for the public good. As Justice Holmes once said:

> Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 413 (1922).

Why does the government regulate property? Not, as some would have us believe, to keep property owners from making a fair profit or to otherwise keep the engines of capitalism in low gear. Rather, we impose limits on certain property uses in order to make communities secure, stable, prosperous and attractive—and thus to protect and enhance property values for everyone.

Although it is nowhere written, it is our belief that we Americans have a compact with our government and with each other. In any number of ways, the government helps to make our property valuable and productive: it builds roads, parks and museums; it makes sure our water is pure and our skies are clean; it helps see to it that our workplaces are safe; and it regulates the stock and bond markets to help keep them stable.

Do we ask that the beneficiaries of a neighborhood park or an agriculture subsidy write a check to the Treasury for the added value to their property? Of course not. Instead, what we ask is that property owners keep up their end of the compact—which is to use property in ways that do not hurt their neighbors or the community at large.

The right to property has *always* carried with it the corollary responsibility not to use property in a way that harms someone else, or the public generally. Again, as the Supreme Court said long ago:

> We think it a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that its use may be so regulated, that it shall not be injurious * * * to the rights of the community. *Holden* v. *Hardy*, 169 U.S. 366, 392 (1898).

S. 605 is based on an opposite premise, entitling property owners to compensation without a fair regard for the consequences to others or to the public generally. The bill, in our view, would dramatically tip the scales of fairness—and place the thumb of the law on the side of a few property owners at the expense of the many, and at the expense, too, of the greater American community.

B. S. 605 IS AN EXTREME DEPARTURE FROM THE CONSTITUTION

The majority argues that S. 605 does little more than codify longstanding fifth amendment jurisprudence. In fact, the bill marks a sharp break from our constitutional tradition on a number of fronts.

Under the Constitution as currently interpreted, the courts decide whether a taking has occurred by *balancing* the interests of the property owner against the legitimate interests of the neighbors and the community. The Supreme Court has recognized that no mechanical bright line rule can strike a fair balance between and among property owners and the public, and has thus insisted on a careful, fact-specific inquiry into all the relevant information at hand. *See Connolly* v. *Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) (takings analysis "eschewe[s] the development of any set formula and * * * relie[s] instead on ad hoc, factual inquiry into the circumstances of each particular case"); *Concrete Pipe & Prods.* v. *Construction Laborers Pension Trust*, 113 S.Ct. 2264, 2290 (1993)(same).

Formulas, calculators and financial appraisals cannot alone measure fairness, the Court has recognized. Required, as well, is a look at all the relevant factors—such as the owner's reasonable expectations in the property, the economic impact of the government action on the property, and the importance of the public interest being protected. *See Penn Central Trans.* v. *New York*, 438 U.S. 104, 124–25 (1978). This kind of flexible balancing (known as the "*Penn Central*" test) recognizes *both* that we should be able to put our property to profitable use, *and* that we have a corresponding responsibility not to use our property in ways that hurt others.

The majority argues that the high court has replaced the *Penn Central* balancing approach with a new set of "bright line" rules. On the contrary, the Court has carved out limited exceptions only in certain narrow and extraordinary contexts: where the government compels a permanent physical occupation of property, *Loretta* v. *Teleprompter CATV Corp.*, 458 U.S. 419 (1982); where it *completely* deprives an owner of the economically beneficial or productive use of land, *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992); or where it exacts a dedication that denies the owner the right to exclude others, *Nollan* v. *California Coastal Comm.*, 483 U.S. 825 (1987); *Dolan* v. *City of Tigard*, 114 S.Ct. 2309 (1994).

Each of these cases presents a rare—or as the *Lucas* Court put it, "extraordinary"—circumstance where *Penn Central* balancing need not be performed. 505 U.S. at 1015. Broader "bright line" rules simply cannot be found in—or be fairly read into—these cases. Indeed, *Nollan* and *Dolan* themselves repeatedly cite *Penn Central* with approval, 483 U.S. at 834, 835, 836 & n.4; 114 S.Ct. at 2316 nn. 5-6, 2318. And in the 1992 *Lucas* case, the Court expressly retained the *Penn Central* balancing test for all but the most discrete and narrow of aforementioned cases, 505 U.S. at 1015. The Supreme Court, plainly, continues to require the balancing approach in the overwhelming majority of takings disputes. *See also Concrete Pipe,* 113 S.Ct. at 2291.

S. 605 would change all that. It does away with the careful balancing of interests, and replaces it instead with a mechanical, "one size fits all" rule of compensation for all cases—thus substituting a formula for fairness, and allowing one person's desired property use to trump everyone else's property rights and welfare.

Among other provisions, section 204(a)(2)(D) entitles a property owner to compensation if a regulation results in a 33-percent loss-in-value to any portion of property—regardless of the property owner's legitimate expectations; regardless of the profitable use of the property as a whole; and regardless, even, of the potential harm that a proposed property use might cause others.

This is an extreme idea. First, it says what the Supreme Court has *never* said: that a loss of property value, standing alone without regard to other factors, is enough to trigger compensation. As recently as 1993, a *unanimous* Supreme Court said it clearly:

> [O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a taking. *Concrete Pipe,* 113 S.Ct. at 1291.[3]

This bedrock constitutional principle has weathered the test of time, not because the Founders and a procession of Justices have been universally insensitive to property rights, but because a look at other factors—like the property owner's legitimate expectations and the ramifications of the proposed property use on neighbors or the public at large—is necessary to decide whether compensation would be fair and just.[4]

In another sharp about-face from constitutional precedent, S. 605 would give a property owner a right to compensation when a regulation impacts only a *portion* of the property. Sections 204(a)(2) (B), (C), (D). In defense of this proposition, the majority cites a lone Federal circuit case, and asserts that the Supreme Court has not reached the question. Report at p. 19.

---

[3] *See also Bowen* v. *Gilliard,* 483 U.S. 587, 606–07 (1987) (Constitution does not compel compensation based on loss in value standing alone); *Keystone Bituminous Coal Ass'n* v. *DeBenedictis,* 480 U.S. 470, 493–502 (1987) (same); *Penn Central,* 438 U.S. at 131 (cases under just compensation clause "uniformly reject the proposition that diminution in property value, standing alone, can establish a taking"); *Agins* v. *City of Tiburon,* 447 U.S. 255, 261–63 (1980) (same); *Goldblatt* v. *Hempstead,* 369 U.S. 590, 593-94 (1962) (same).

[4] Quoting only part of a now famous *Lucas* footnote, 505 U.S. at 1019 n.8, the majority argues that "any doubts about the requirement of just compensation for partial takings" have been laid to rest. Report at p. 19. The unquoted portion of that footnote, however, tells more than the other half of the story. For there, the Court makes clear that in the vast majority of cases where a loss in value is less than complete, the *Penn Central* balancing test governs. Under that approach, as we have seen, compensation for a diminution in value, though severe, is not automatic and certainly not "required"—as it would be under S. 605.

We respectfully commend to them the unanimous 1993 opinion in *Concrete Pipe.*[5] There, the Court ruled that, in assessing regulatory burdens on property, we should look to the *property as a whole,* rather than segmenting it into smaller parts:

> A claimant's parcel of property [can] not first be divided into what [is] taken and what [is] left for the purpose of demonstrating the taking of the former to be complete and hence compensable. * * * [T]he relevant question is whether the property taken is all, or only a portion of the parcel in question. *Concrete Pipe,* 113 S.Ct. at 2290.[6]

S. 605, on the other hand, would give a property owner a right to compensation when even the smallest portion of his property is affected. So if a developer is allowed to develop 99 acres of a 100-acre parcel, but prevented from filling in a wetland on the one acre, S. 605 could entitle him to compensation for that acre—even if the rest of his property is exceedingly profitable, and even though preserving the acre of wetlands would help prevent flooding of his neighbor's land.

It also seems to us that the 33-percent compensation threshold, at bottom, is illusory—analytically and practically. As Professor Carol Rose of Yale Law School testified:

> Once land can be apportioned into "relevant" portions, any diminution can be manipulated to become a 100% diminution. This effectively means that virtually any regulation with *any* adverse impact on an owner's parcel could become an occasion for compensation, without regard to the owner's expectations and whether they were reasonable. (Written statement of Prof. Carol M. Rose, Apr. 6, 1995, at 12–13.)[7]

The majority attempts to address some of our concerns by arguing that current case law can simply be read into the bill. Where property is subject to a "preexisting regulatory scheme," they note, courts have not found a taking vis-a-vis the new property owner—and, in such a situation, compensation is unwarranted because the regulated entity has little or no "reasonable expectation" for unrestrained use of the property. Report at pp. 26–27.

This we find a non-sequitur. Obviously, S. 605 would not require compensation to a new property owner for certain preexisting re-

---

[5] 113 S.Ct. 2264.

[6] Nowhere does the majority in its 74 footnotes mention *Concrete Pipe.* So we also recommend: *Penn Central,* 438 U.S. at 130–31 ("Takings jurisprudence does not divide a single parcel into discrete segments * * * In deciding whether a particular governmental action has effected a taking, this Court focuses * * * on the * * * interference with the rights in the parcel as a whole") (unanimous); *Keystone Bituminous Coal,* 480 U.S. at 498 (rejecting claim that Court should only look at coal that state law required to be left to prevent subsidence); *Andrus* v. *Allard,* 444 U.S. 51, 65–66 (1979) (unanimous); *Clajon Production Corp.* v. *Petera,* 70 F.3d 1566, 1577 (10th Cir. 1995)(unanimous) (case must be viewed in light of defendant's entire property; takings analysis must focus on "entire bundle of rights associated with a parcel of land"); *Tabb Lakes, Ltd.* v. *United States,* 10 F.3d 796, 802 (Fed. Cir. 1993)("[c]learly, the quantum of land to be considered is not each individual lot containing wetlands or even the combined area of wetlands"); *Mountain States Legal Foundation* v. *Hodel,* 799 F.2d 1423, 1430–31 (10th Cir. 1986)(en banc), *cert. denied,* 480 U.S. 951 (1987); *MacLeod* v. *Santa Clara,* 749 F.2d 541, 546–47 (9th Cir. 1984)(unanimous), *cert. denied,* 472 U.S. 1009 (1985).

[7] The Federal Circuit has also concluded that under an "affected portion" standard, "protection of wetlands via a permit system would, *ipso facto,* constitute a taking in every case where [the Army Corps of Engineers] exercises its statutory authority." *Tabb Lakes, Ltd.* v. *United States,* 10 F.3d 796, 802 (Fed. Cir. 1993).

strictions. But it simply does not follow that *new* regulations in a heavily regulated industry would be non-compensable under the bill.

But more to the point, we believe that the majority is simply wrong in assuming that case law would somehow supersede or mitigate the effects of S. 605. Statutes are written to change the law, and S. 605 is no exception. Nowhere in the bill is there language providing a defense of "reasonable expectations," or exempting from its scope industries subject to "preexisting governmental restrictions." To the contrary: with its so-called "bright line" standards, the bill *reads out* the constitutional safeguards against unreasonable compensation awards.[8]

The majority elsewhere advances its codification-of-the-Constitution argument by pointing to statutory language drawn from various Supreme Court cases. Context, however, is all—and words pulled out of context can take on a meaning quite different than that originally intended or articulated. Such is the case with various provisions in S. 605.

For instance, section 204(a)(2)(B) would require compensation where a condition for a permit, license or any other agency action lacks a "rough proportionality between the stated need for the required dedication and the impact of the proposed use of the property." Section 204 (a)(2)(B). This language takes its cue from *Dolan* v. *City of Tigard*, 114 S. Ct. 2309, 2318–22 (1994) which ruled that, where the government requires a permit applicant to dedicate property in a way which eviscerates his right to exclude others, the government must meet a higher "rough proportionality" standard. The *Dolan* Court went out of its way, however, to distinguish such dedication requirements—which take away an "essential attribute" of property ownership (there, the right to exclude others)—from regulations which merely restrict the ability to use property in a particular way. *Id.* at 2316–17. S. 605 extends the *Dolan* principle far beyond public dedications of real property—and applies it across the board to any type of condition on agency action that "exacts or affects" any type of property interest. Section 204(a)(2)(B).

S. 605, there's no disputing, does much. But codify the Constitution it does not. As Joseph Sax, a constitutional expert in this field now serving as Counselor to the Secretary of the Interior testified:

> S. 605 embodies an explicit departure from the constitutional standard adopted by the Supreme Court, and incorporates a standard that has been repeatedly rejected by the Court as inappropriate. * * * The consistent judgment

[8] "Of course," the majority states, "the actual result [in takings cases involving regulated entities] depends in great degree on the specific facts of those cases." Report at p. 27. This statement raises another point. As elsewhere in the Report, the majority here seems to be acknowledging that its "bright line" rules are a little less than bright—and that, even under S. 605, takings claims would raise complex and fact-specific questions. (Or, as the majority puts it in criticizing the *Penn Central* balancing approach, where "every takings case deteriorates into a fact-specific inquiry * * *" *Id.* at p. 16.) What "reasonable expectations" does a regulated entity have? Does a firearms dealer reasonably expect that he can sell semiautomatic rifles, or not? And what does it mean to say that an industry is "subject to existing heavy regulation"? The bill thus seems caught on the horns of a dilemma. On one hand, if it does not allow consideration of these sorts of questions, there will be no way to eliminate undeserving claims. On the other hand, allowing consideration of such questions, whether in court or an administrative proceeding, will dash any hopes for a clear, simple and inexpensive claims process.

of the Supreme Court spanning nearly the whole of the nation's history should sound a warning note against efforts to legislate a one-dimensional, one-size-fits-all, purported bright-line standard. (Written statement of Joseph Sax, Oct. 18, 1995, at 2, 8.)[9]

C. S. 605 WILL UNDERMINE IMPORTANT PROTECTIONS FOR THE PUBLIC

The debate over S. 605, involving an often arcane constitutional jurisprudence, can sometimes sound rather academic. But we believe that the every-day harm—to real people in the real world—that S. 605 could work is anything but academic.

The scope of the bill is itself breath-taking, as it goes beyond mere land-use restrictions and covers environmental, public health, financial, safety and civil rights regulations. And it is not limited to real property, but "inchoate interests" in real property, section 203(5)(A)(ii); the right to use or receive water, section 203(5)(B); rents, issues and profits of land, section 203(5)(C); property rights provided by contract, section 203(5)(D); "any interest defined as property under state law," (which sweeps in the gamut of personal property and intangible property, like patents and licenses), section 203 (5)(E); and any other interest "understood to be property," section 203(5)(F).

Consider the potential implications:

Suppose the Food and Drug Administration, prompted by new research, determines that a drug on the market poses a serious health risk. When the FDA bans the dangerous drug, its manufacturer will have shelves of useless inventory and production equipment that will be greatly devalued—clearly "property" within the meaning of the bill. *See* sections 203(5)(A)(iii), (E). Should we have to compensate the manufacturer for its losses? Should we have to *pay* him to keep his dangerous drug off the market? Under this bill, we might.

We do not, of course, believe that the authors or supporters of S. 605 *intend* such a result. We are simply reading the plain language of the bill—which we believe would authorize, however unintentionally, a host of undeserving claims.[10] And although some may accuse us of crying wolf, we suggest that they take a look at a few of the takings cases actually brought and litigated in recent years.

A few years ago, a California restaurant owner argued that he should be compensated by the government because, under the Americans With Disabilities Act, he was required to make his rest-

[9] Lest our legal analysis be deemed partisan, we note that among those who agree that S. 605 departs markedly from the Constitution are the non-partisan Congressional Research Service, *see* Memorandum from CRS, American Law Division, to Senate Committee on the Judiciary, "Comparison of the Compensation Threshold in S. 605 (Title II) with that in the Takings Clause of the Fifth Amendment" (Feb. 1, 1996); a bipartisan group of 33 State attorneys general (takings bills "purport to implement constitutional property rights protections, but in fact they promote a radical new takings theory that would severely constrain the government's ability to protect the environment and public health and safety") (Letter to Members of Congress, Sept. 26, 1994); and 126 professors of constitutional, property and environmental law from around the country ("we view such legislation as flawed caricatures of constitutional rules that would impose wholly new and burdensome requirements on Congress and the federal agencies when they seek to protect private property and public health and safety") (Letter to Members of Congress, June 29, 1994).

[10] We are mindful of the "venerable principle" announced by Justice Scalia "that if the language of a statute is clear, that language must be given effect—at least in the absence of a patent absurdity." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 452 (1986) (Scalia, J., concurring).

rooms wheelchair accessible. *Pinnock* v. *International House of Pancakes,* 844 F.Supp. 574, 586–87 (S.D. Cal. 1993), *cert. denied before judgment,* 114 S.Ct. 2726 (1994). Under current law, the court rejected the claim. *Id.* at 587–89. Under this bill, if the restauranteur could show, say, that he had to build a ramp to a bathroom, thereby reducing table space, and resulting in a 33-percent drop in profits attributable to that portion of his property, he could be entitled to compensation. He could have to be *paid* to make his restaurant accessible to the disabled.

Also several years ago, the Federal Communications Commission promulgated "dial-a-porn" regulations designed to prevent children from having easy access to pornography over the telephone. One of the dial-a-porn providers sued, and argued that the regulations amounted to a taking of his property. *Carlin Communications, Inc.* v. *FCC,* 837 F.2d 546 (2d Cir. 1988), *cert. denied,* 488 U.S. 924 (1988). (Unfortunately, it is profitable to peddle pornography to children—and the regulations, which made it harder for children to access the material, were apparently cutting into the provider's profits.) Should we have to pay that person? The court, under current takings law, rejected the claim out of hand. *Id.* at 557 n.5. Had S. 605 been on the books, however, things might have been quite different.

In West Virginia, a coal company removed so much coal from an underground mine that huge cracks opened on the surface of the land, rupturing gas lines, collapsing a stretch of highway, and destroying homes. After the State refused to take action, the Interior Department stepped in and directed the company to reduce the amount of coal it was mining. The company sued, claiming that Interior's action constituted a compensable taking. The court under our current law once again rejected the claim. *M & J Coal Co.* v. *United States,* 30 Fed. Cl. 360, 368 (1994), *affirmed,* 47 F.3d 1148 (Fed. Cir. 1995), *cert. denied,* 116 S.Ct. 53 (1995). Yet under this bill, the coal company might very well have been entitled to compensation for its business losses. *See* section 204(d)(2)(B) (providing for compensation of business losses).

And what about pollution? When the government sets air or water quality standards that require new technologies for industrial sites, compliance can be expensive, and can lower an enterprise's value. If the government is unable to prove that emissions fall within the bill's narrow nuisance exception (discussed below), S. 605 could require the taxpayers to pay compensation—or pay the company, as it would turn out, not to pollute.

D. THE BILL'S "NUISANCE EXCEPTION" IS WHOLLY INADEQUATE TO PROTECT VITAL INTERESTS, BOTH PUBLIC AND PRIVATE

In response to these criticisms, the majority points to the bill's so-called "nuisance exception." Section 204(d)(1). We won't have to pay polluters not to pollute, we won't have to pay pharmaceutical companies to take their dangerous drugs off the shelves, we won't have to pay restaurants not to discriminate, they say, because these actions constitute a "nuisance." Nuisance, in their view, seems to mean something like: "things that are bad" or "actions which cause harm."

But that is neither what the bill says nor what it would do. To quote the relevant provision: compensation would not be required if a property use—

> is a nuisance as commonly understood and defined by background principles of nuisance and property law, as understood within the state in which the property is situated. Section 204(d)(1).[11]

Due to the many limitations, complexities, and peculiarities of State nuisance law, this provision would not bar undeserving claims—and the bill would still require us to pay people not to put their property to harmful or socially unacceptable uses. Here's why:

- Nuisance law in most States covers only immediate, demonstrable harm; it simply does not address actions whose health and safety risks are long-term. So it might very well not be a nuisance to dump toxins into the water or out into the air—because they do not cause identifiable harm today or even tomorrow. The fact that the damage will occur a few years from now does not generally figure into "nuisance" law, as it does with our Federal environmental laws.
- Similarly, nuisance law does not address the problem of *cumulative* harms—where, say, many low-level polluters create a harm that none alone would cause.
- Also, a nuisance generally must be *substantial and continuing*—so nuisance law often does not apply to the one-time or intermittent polluter.
- Some State nuisance laws contain strict scienter requirements that can be satisfied in only the most egregious cases.
- And finally, though the principles of nuisance law are stated rather uniformly among the States, interpretation and application vary quite markedly from State to State. In practice, the nuisance exemption would mean that we would have different compensation schemes—not to mention different environmental protections—from one State to another.

Consider some real world examples of how nuisance law has proven inadequate to prevent environmental harm, protect neighboring property values, or safeguard public health and safety:

- In Massachusetts, contamination of one's own property is *not* a nuisance—even if spilled chemicals enter the groundwater and migrate to a neighboring property. *American Glue & Resin, Inc.* v. *Air Products & Chemicals, Inc.*, 835 F. Supp. 36 (D. Mass. 1993).
- In Maine, filling a portion of property and creating a barrier to water drainage is *not* a nuisance—even though it interferes with the drainage on the adjoining property. *Johnson* v. *Whitten*, 384 A.2d 698 (Me. 1978).
- In New York, a cement plant which created offensive noise, white powder, and pollution by unlawfully discharging waste into a bay adjoining a residential neighborhood did not run afoul of the State's nuisance law—because the plant's actions did not rise to the high legal standard for nuisance, which requires that the activity be intentional and unreason-

[11] The bill further makes it explicit that, to bar a damage award, the government must bear the burden of proving that a proposed use would constitute a nuisance. *Id.*

able, negligent or reckless, or abnormally dangerous. *Benjamin* v. *Nelstad Materials Corp.*, 625 N.Y.S.2d 281 (N.Y. App. Div. 1995).

- In Maryland, a *current* tenant does not have a cause of action in nuisance against a *former* tenant for contaminating the property prior to the current tenant taking possession. *Rosenblatt* v. *Exxon Co.*, 642 A.2d 180 (Md. 1994).

These examples make it clear: State nuisance law will not protect us from ''things that are bad'' or ''actions that cause harm.'' Nuisance law was simply never meant to stretch so far, but arose, instead, as a common-law effort to arbitrate the one-on-one property disputes between neighbors. It is plainly ill-suited to address the more complicated, large-scale environmental, health and safety problems of our day.

Indeed, when the Congress passed our landmark environmental laws, it was with the full realization that State nuisance law could not adequately or uniformly protect nearby landowners or the community at large. For example, when Congress was considering the Clean Air Act in 1970, it heard about a rendering plant in Bishop, Maryland, whose emissions were doing damage to the health and welfare of people nearby. Some of the problems that the plant's neighbors were having included nausea, vomiting, labored breathing and respiratory problems. Not surprisingly, property values in the area were depressed, and businesses stayed away. The report's conclusion:

> Bishop Processing Company's dry rendering plant has had problems with malodors since it became operational in 1955. Officials from Delaware and Maryland recommended corrections but *all efforts to obtain abatement by local and state officials through public nuisance laws have been fruitless.* (S. Doc. No. 63, 91st Cong., 2d sess. 1679 (1970)) (emphasis added).

Similarly, in 1979, when the Senate was developing Federal hazardous waste legislation, it heard testimony about 17 industries that were polluting the Warrior River in Alabama, and damaging neighboring riparian owners. The person representing the owners testified that:

> [t]here was every sort of polluter involved in that case, just about. They continued to pollute. Why? *Because we could not find a successful vehicle under the common law, under nuisance law, that would adequately protect these individuals.* (Hazardous and Toxic Waste Disposal: Hearings before the Subcommittees on Environmental Pollution and Resource Protection of the Senate Committee on Environment and Public Works, 96th Cong., 1st sess., Sept. 7, 1979, at 693) (emphasis added).

It is as true today as it was yesterday: State nuisance law cannot adequately safeguard our environment, and it cannot see to it that the health, safety and property values of neighboring landowners are protected. Furthermore, nuisance law does not even address other vitally important public interests—like civil rights protec-

tions, worker safety rules, and product safety guidelines. Discrimination may be shameful—but it is not a "nuisance."

The majority argues that our complaint is not with S. 605, but with the Supreme Court's *Lucas* decision—which (according to the majority) established the nuisance exception codified in S. 605. Report at 29. We dispute this contention by agreeing with another: "[t]he nuisance exception," the majority writes elsewhere in its Report, "is not an exception at all." Id. at 28. Indeed, it has been historically and universally understood that the "bundle of rights" that comes with property ownership has *never* included the right to commit a nuisance.

That a property owner does not have the right to make a nuisance of his property is not a revolutionary idea. What *is* revolutionary is S. 605's application of the idea—for it makes the "nuisance exception" the *only* limitation on a broad new set of compensation entitlements, including the sweeping 33-percent diminution-in-value trigger. This is a dramatic about-face from current practice. *Lucas* is clearly and expressly limited to the rare "total loss" category of takings cases. For the vast majority of cases, the question of whether a restricted use constitutes a nuisance is never dispositive.

Indeed, in a case cited by the majority, *Miller* v. *Schoene,* 276 U.S. 272 (1928), the Supreme Court made it perfectly clear that compensation does not turn on whether the restricted land use constitutes a nuisance. There, the Court held that government destruction of cedar trees to prevent the spread of disease to nearby apple orchards was not a compensable taking. *Id.* at 279. The Court did not, however, base its judgment on a finding that the cedars constituted a nuisance. To the contrary: the Court found it unnecessary to "weigh with nicety the question whether the infected cedars constitute a nuisance according to the common law; or whether they may be so declared by statute." *Id.* at 280.

Indeed, *Lucas* itself makes the point that cases like *Miller*

> are better understood as resting not on any supposed "noxious" quality of the prohibited uses but rather on the ground that the restrictions were reasonably related to the implementation of a policy—not unlike historic preservation—expected to produce a widespread public benefit and applicable to all similarly situated property. *Lucas,* 505 U.S. at 1023 (quoting *Penn Central,* 438 U.S. at 133–34 n. 30).

Again, there is nothing remarkable about this proposition. For it has long been understood that the government can, and should, regulate activities which do not constitute a nuisance—without having to pay compensation to an affected property owner.[12] Zoning, of course, stands as a key example. No one would argue that building a house right up against the sidewalk constitutes a nuisance. But nor would anyone argue, we assume, that we should have to compensate people to abide by setback rules. But because

---

[12] *See, e.g., Village of Euclid* v. *Ambler Realty Co.,* 272 U.S. 365 (1926) (zoning); *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241 (1964) (civil rights); *Penn Central,* 438 U.S. 104 (1978) (historic preservation); *Goldblatt* v. *Hempstead,* 369 U.S. 590, 593 (1962) (sand and gravel mining); *see also Lucas,* 505 U.S. at 1023 (rejecting suggestion that such cases are "premised on, and thus limited by, some objective conception of 'noxiousness'").

S. 605, with its sweeping new "takings" standards, makes "nuisance" the only backstop against compensation, that is precisely the situation that we could find ourselves in.

E. THE BILL IS A BUDGET BUSTER

S. 605, as we have discussed, would require the public to pay compensation in many circumstances not now required under the Constitution. We believe the new compensation entitlements are unwise, unjust and extreme. But they are also prohibitively expensive. As one of our former colleagues, Senator Paul Tsongas, has said of the bill:

> From the standpoint of a citizen dedicated to improving our nation's fiscal discipline, takings legislation is a prescription for disaster. Takings bills are budget busters.* * * They would require unjust compensation at taxpayer expense. (Written statement of Paul E. Tsongas before the Senate Committee on Environment and Public Works, July 12, 1995, at 2, 3.)[13]

The Office of Management and Budget has estimated that the narrower takings bill passed by the House of Representatives, H.R. 9—which applies only to real property and covers only six environmental statutes—would cost the taxpayers $28 billion over the next 7 years. OMB says that this bill, which is much broader, would be several-fold more expensive. (Letter from OMB Director Alice Rivlin to Chairman Hatch, June 7, 1995.)

When the Congressional Budget Office was asked to estimate the costs of S. 605, it responded with more questions than answers. While CBO calculated that it would cost $30 to $40 million dollars to simply *administer* the bill over the next 5 years, the office reported that it could not estimate the long-term costs of *compensating* property owners under the bill. (Letter from CBO Director June O'Neill to Chairman Hatch, Oct. 17, 1995, at 2.)[14]

Of course, it is the compensation costs—the dollars it would take to *compensate* a new category of property owners—that would work the most financial harm. And where the CBO did address the compensation issue, we believe it made several false assumptions. For example, the analysis assumes that the bill would "codify the constitutional prohibition" against uncompensated takings. (CBO letter, at 1.) As we have discussed at length, the bill creates an entitlement to compensation far broader and more expansive than the Constitution. The CBO also concludes that the 33-percent compensation threshold would screen out most compensation claims. Id. at 4. We believe, to the contrary, that the threshold would be of minimal significance in these cases because a litigant could read-

---

[13] Responding to the fiscal concerns voiced by former Senator Tsongas, Senator Robert Dole last spring was quoted as saying, "I think he has raised some legitimate questions. Maybe there is another way to do it. We are not trying to run up the tab. We know one thing we can't do is spend a lot of money." *Boston Globe*, Apr. 29, 1995, at 13.

[14] To quote the letter precisely: "CBO has no basis for estimating the additional amounts of compensation that the government might have to pay for cases where property owners choose to pursue larger claims in court," CBO letter, at 2; compensating property owners in the longer run is "very uncertain," *id.*; costs of claims in later years "is very difficult to predict," *id.* at 5. Even those skeptical of other multi-billion dollar estimates should, it seems to us, be concerned about a bill whose financial risks to the taxpayers—even under the most optimistic of estimates—is unknowable.

ily show that an agency action devalued an "affected portion" of property by at least 33 percent.[15]

But the most revealing thing about the CBO estimate, echoed throughout the majority report, is the assumption that S. 605 will not be expensive because it will force the agencies to alter their regulatory course. To quote the letter:

> CBO expects that enacting the bill would cause federal agencies to attempt to avoid paying compensation by modifying their decisions * * * or otherwise changing their behavior. (CBO letter, at 2.)

What we hear the CBO and the majority to be saying is this: threatened with prohibitive compensation costs, agencies will simply stop regulating—which, translated, means they will stop protecting our environment, stop ensuring public safety, stop looking out for the community welfare. This, it seems to us, amounts to back door regulatory reform. It is not reform out in the sunshine, where changes to regulations can be debated on the merits, but an effort to curtail our environmental, health, and safety protections in the dark—by telling agencies that we will drain their budgets unless they stop regulating.

To those who do not share our concerns—who in fact hope and intend that the bill will induce regulatory rollbacks—we sound a different note of caution. Many regulatory decisions are not purely discretionary, and regulators are often not free to decide for themselves how vigorously to implement or enforce regulations. Instead, the first obligation of regulators is to comply with the law, which in many cases constrains regulatory discretion with binding legal standards and other mandates. Thus in many situations, it would simply be unlawful for an agency to permit an activity, regardless of the economic impact of a permit denial.

So what would an agency do? If judgments exceed available funds, might it not pay a fraction of each judgment? Or would it pay only the first few cases in line—which would likely be brought by the most monied of property owners and their blue chip lawyers.

This is no way for the Government to do business—and no way, certainly, to strike a fair balance between the rights of individual property owners and the rights of neighbors and the community at large.[16]

---

[15] One way or another, the bill seems destined to miss its mark. If, as the CBO contends, few regulated property owners would be able to prove a 33-percent reduction in the value of their property, the bill's many (uncompensated) constituents will be sorely disappointed. If, on the other hand, thousands of affected property owners *can* recover, there seems to be no stopping a billion-dollar run on the Federal coffers.

[16] S. 605 also requires a Federal agency to compensate property owners whenever a State agency administering a Federal program takes action that effects a taking under the expansive definition in the bill. Section 204. Although the State action is the trigger, "[c]laims arising from the action, inaction, or indecision of a State agency are properly filed against the Federal agency which administers the relevant Federal program." Section 204(b). Thus, S. 605 gives State agencies the extraordinary power to obligate Federal funds.

In order to allow States greater flexibility, in recent years Federal lawmakers and agency heads have delegated more and more authority to State agencies to administer Federal programs. This is especially true in the area of environmental regulations where States are often authorized to issue regulations, review permit applications, perform inspections, and enforce the law. Exposing the Federal Government to liability for these State activities will surely be a disincentive for this type of cooperation. Far from encouraging State involvement, if S. 605 is enacted, Federal agencies will no longer be able to afford this cooperation, and the voice of the States in Federal regulatory lawmaking will be muted.

F. THE BILL WILL CREATE A LITIGATION EXPLOSION

The proponents of S. 605 herald the bill as a beacon of clarity and certainty in an otherwise foggy area of the law. We believe, quite to the contrary, that S. 605 will bring to the law less clarity, not more, and that it will generate a mountain of litigation—not only because it opens the door to many new claims, but because the courts will need to resolve many novel factual and legal questions.

The bureaucratic demands on the government alone would be massive. As Associate Attorney General John Schmidt testified:

> Agencies would need to hire more employees to process compensation claims, more lawyers to handle claims, more investigators and expert witnesses to determine the validity of claims, more appraisers to assess the extent to which agency action has affected property value, and more arbiters to resolve claims. The sheer volume of entitlement requests under these schemes would be overwhelming. The result would be far more government, not less. (Written statement of Associate Attorney General John R. Schmidt, Apr. 6, 1995, at 14–15.)

By its very terms, the bill is an inventive lawyer's dream. What follows is just one of its many different definitions of "property":

> any interest understood to be property based on custom, usage, common law, or mutually reinforcing understandings sufficiently well-grounded in law to back a claim of interest. Section 203(5)(F).

What is a "custom" or "usage"? When are interests "understood" to be property? What about claims based on an activity sanctioned by custom or usage but not recognized by state law? What sorts of "understandings" are "mutually reinforcing" and "sufficiently well-grounded in law to back a claim of interest"? The legal arguments, we predict, would be as lavish as a lawyer's ingenuity and a client's checkbook would allow.

As discussed above, S. 605 provides a cause of action for compensation if an agency action (or inaction) reduces the fair market value of an *affected portion* of property by 33 percent. Section 204(a)(D). This the majority heralds as a bright line test. However, in even the most straightforward and uncomplicated of business transactions, placing a value on property is no simple or clear cut matter. How are we to decide what the affected portion of property is? How to tell whether it has been devalued by 33 percent? What was the fair market value both immediately before and immediately after the governmental action? Battles among lawyers, appraisers, accountants and expert witnesses will abound.

Other definitions in the bill are equally vexing. As we have also discussed, central to the bill is its reliance on State nuisance law—or, more precisely, on "nuisance as commonly understood and defined by background principles of nuisance and property law. * * *" Section 204(d)(1). As Dean Prosser has written: "there is perhaps no more impenetrable jungle in the entire law than * * * nuisance." W. Page Keeton et al., Prosser and Keeton on the Law of Torts, section 86 at 616 (5th ed. 1984). This provision alone would generate complex, protracted and expensive proceedings.

Such legal quagmires, furthermore, will not have to be waded through only once or twice—but over and over again, case by case, claim by claim.

G. OPPOSITION TO S. 605 IS WIDESPREAD

Although ours is the minority view on this Committee, we find ourselves in very good and far-reaching company all across our Nation. As we have noted already, the Clinton administration stands with us in solid opposition to this bill. So, too, State and local officials nationwide have voiced their unequivocal objections to takings legislation. What follows is a small sampling of their comments.

From the National Conference of State Legislatures:

> [S. 605] would radically expand the [constitutional] definition of a compensable government action and create an expensive new entitlement program. At its core, this takings legislation would severely limit the government's ability to govern by forcing government to pay for the right to regulate. (Letter to U.S. Senators, Apr. 19, 1995.)

From the National League of Cities:

> In order to avoid the compensation requirements provided in the bill, the federal government might severely curtail its efforts to achieve environmental and other regulatory objectives and, instead, pressure local governments to adopt regulations to undertake these objectives. * * * S. 605 is *not* a solution to municipal concerns about federal overregulation. [It] is a blunt instrument that would exacerbate rather than solve the major issues with federal government overregulation and would be likely, in the end, to lead to more mandates on local governments—thus making the problem worse, not better. (Letter to U.S. Senators, July 18, 1995.)

From 33 State attorneys general in 1994:

> [Takings bills] purport to implement constitutional property rights protections, but in fact they promote a radical new takings theory that would severely constrain the government's ability to protect the environment and public health and safety. (Letter to Members of Congress, Sept. 29, 1994.)

Takings legislation is also opposed, among many, many others, by the National Governors Association, the Western State Land Commissioners Association, the United States Conference of Mayors, the National Institute of Municipal Law Officers, the League of Women Voters, the American Public Health Association, the United States Catholic Conference, as well as senior citizens groups, consumer and health organizations, labor groups, historic preservation groups, hunting and fishing organizations, local planning groups and civil associations, civil rights groups, and environmental organizations.

The voices from our Nation's editorial boards are also roundly, and strongly, critical of takings legislation. Again, a sampling:

Polluter's Loophole

A better title for this measure would be "The Polluters Public Compensation Act of 1995." It would open a whole new federal entitlement category to pay millions to industry, ranchers, miners, or anyone else who could show that regulations cut into profits or assets. * * * The inevitable result would be a gutting of environmental protections, as they would become prohibitively expensive to enforce.

Mesa [AZ] Tribune, February 27, 1995.

Law Threatens Environment and People; Ill advised "takings" law will take the public to the cleaners

[T]his measure has little to do with the little guy and much to do with the grazing, logging, mining, and developmental interests that are backing this proposal—and who will benefit most from its enactment. At first glance, the idea looks reasonable, but the ramifications are staggering. * * * The government would have to choose between paying a would-be polluter not to pollute, or not enforcing the anti-pollution law. * * * Are there not less radical ways to deal with certain problems posed by environmental regulations? Is this how [the American people] think their hard-earned tax dollars should be spent?

The Times Record [Brunswick, ME], March 6, 1995.

Tricking the Taxpayers

So called "takings" legislation would force the public to pay bribes

Primary beneficiaries would be those who profit from polluting. Primary losers would be their neighbors and the American taxpayers. * * * Like a hustler who threatens a frivolous lawsuit in hopes his target will pay him to avoid the hassle, a property owner can declare his intent to develop his land in a way that would violate regulations in hopes of tricking taxpayers into paying him not to. Must the public pay a business to act responsibly? Must your taxes go to bribe a landlord not to wreck your neighborhood? * * * The right answer to the "takings" nonsense is no.

The Des Moines Register, May 15, 1995.

"Takings" Bill a Vehicle for Exploitation

On a local level, a neighbor who pollutes a creek or kills somebody's lawn with a chemical drift could actually seek damages if somebody complained. It amounts to blackmail. * * * On the national scale, exploitation-minded corporations would profit at taxpayer expense. Virtually anyone who could show that regulations cut into profits or assets could file claims against the government. * * * [T]he "takings" bill isn't about private property rights; it's a vehicle for greed and exploitation, and * * * persisting with

> something so obviously flawed and potentially disastrous as the "takings" legislation isn't responsible lawmaking.
>
> *The Bismarck* [N.D.] *Tribune,* May 12, 1995.

Tossing Out the Baby

> [T]axpayers can expect to one day pay a price so high that the sponsors of the so-called "taking" legislation don't even know how to forecast its size. The tab * * * could make the current federal deficit look like pocket change * * * [L]awmakers * * * can amend environmental laws, alter regulatory programs and deal directly, and honestly, with property issues. And they can do it without mortgaging the quality of our air, water and land, and without assaulting the public pocketbook.
>
> *The Charlotte [N.C.] Observer,* March 7, 1995.

Second Take on Takings

> Holding out the promise of compensation would set off years of litigation, prompt speculators to buy up unusable properties simply for the chance to dun the government and cost the taxpayers billions in property settlements, legal costs and additional regulatory red tape.
>
> *The Sacramento Bee,* March 9, 1995.

State governments and citizens, too, have time and again rejected takings legislation. Some 32 State legislatures have considered and declined to adopt takings bills. Just a few months ago, the voters in Washington State rejected a referendum that would have enacted far-reaching State takings legislation. When the citizens of Washington took a good look at a proposal much like S. 605, they saw who would win and who would lose—and they said, "no."[17]

H. THERE IS A BETTER WAY.

Once again, we do not take lightly complaints about insensitive or excessively burdensome regulations. And we join our colleagues in deploring the hardship such regulations may cause American property owners, large and small. But we believe that this heavy-handed bill would do less to right such specific wrongs than it would to fundamentally realign the balance of power among property owners, at the expense of many a neighbor and the community at large.

Ours, therefore, is a different call to action: instead of trying to rewrite the Constitution, we should craft specific solutions to specific problems. Where there are Federal programs treating property owners unfairly, we should fix them. And the Clinton administration, for its part, appears to be well on the way to doing just that, especially on behalf of smaller landowners.

---

[17] A 1995 study estimated that the potential compensation exposure under the Washington initiative was upwards of $11 billion. (Referendum 48—Economic Impact Study of the Property Rights Initiative, University of Washington, Institute for Public Policy Management, 1995.) In the two other times when citizens have been presented with statewide takings referenda—in Arizona in 1994 and Rhode Island in 1986—they voted them down.

For example, the Army Corps of Engineers and the Environmental Protection Agency have issued a regulation that allows landowners to build single-family homes and related structures on nontidal wetlands without individual permits. The EPA and Corps have issued a proposed regulation to streamline the permit appeals process, to allow for faster and cheaper administrative appeals of wetlands permit decisions and wetlands jurisdictional determinations. The administration has also exempted some 53 million acres of farmland from wetlands regulations. (See addenda to written statement of Joseph Sax, Oct. 18, 1995.)[18]

Further, with regard to the Endangered Species Act, the Interior Department has issued a proposed rule that will presumptively exempt from the Act's threatened species requirements single family homeowners with 5 or fewer acres. Interior has also put into place both "no surprises" and safe harbor policies that will help protect property owners' expectations and create incentives for landowners to protect the resources on their property. *Id.*

Moreover, the chairman of the Senate Environment and Public Works Committee, Senator Chaffee—who also strongly opposes this bill—testified that his Committee has held hearings on, and is taking a close look at a variety of statutes, including the Endangered Species Act, Superfund, and the wetlands provisions in the Clean Water Act. (Written statement of Senator John Chaffee, Oct. 18, 1995, at 9).[19]

Where reform is needed in these specific statutes, we should proceed apace. But we should not pass this bill, and create what would essentially be a two-tiered system of laws in this country: where we would have one set of laws that we are all supposed to obey, and another set of laws that some property owners are *paid* to obey.

We recognize that there are people who disagree with our nation's environmental laws or with our health and safety laws. We call on them to make their case to the American people. It is the prerogative of all citizens to do what they can to change laws with which they disagree. But it is not their prerogative, in our view, to demand that they be *paid* to comply with them.

Most Americans are willing to obey the law for free. We don't pay people to stop behind the school bus. And we don't pay people to stay off drugs. We should not pay people to abide by our environmental laws, our civil rights laws, and our health and safety laws.

---

[18] In a related vein, the Army Corps of Engineers reports that it approves the vast majority of wetlands permit applications. In 1995, for example, approximately 62,000 people applied for permits. Of these, only 274 were denied—less than one-half of one percent. Moreover, 83 percent of the applications were approved within 17 days, with an overall average response time of 26 days. *See* Memorandum from Michael L. Davis, U.S. Army Corps of Engineers Regulatory Branch Chief, Operations, Construction and Readiness Division, to District and Division Regulatory Chiefs, Nov. 8, 1995.

[19] We think Senator Chaffee's testimony is worth quoting further:

> [I]t is clear to me that enactment of S. 605, or other compensation legislation, would be a mistake. The far preferable way to proceed is to amend individual environmental statutes—not by adding a new statutory right to compensation—but by making the statutes more user-friendly and flexible for affected property owners. * * * Our goal is to ensure that a property owner is not unfairly asked to forego the fruits of his investment and labor, on the one hand, and, on the other, also to ensure that the government can work to protect the welfare of other property owners and the environment we all share. (Senator Chaffee statement, at 9–10.)

II. New Court of Claims Jurisdiction: An Unwise Expansion of Power

S. 605 would grant the Court of Federal Claims ("CFC") new and sweeping jurisdiction to invalidate any statute or regulation that "adversely affects private property rights" in violation of the fifth amendment to the Constitution. Section 205(a), (d). The provision would also give the CFC new powers to grant injunctive and declaratory relief, section 205(d)(B), and to hear tort claims against the United States, section 205(d)(C)(4). We believe that this dramatic expansion of the Court's authority raises serious constitutional and practical concerns.

Article III of the Constitution provides that "[t]he judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." The defining attributes of article III judges are life tenure and protected salaries, which are meant to safeguard their independence from the legislative branch and insulate them from political pressure. The Court of Federal Claims, on the other hand, is an administrative tribunal—or so-called "legislative" court—created under article I. The judges who sit on the CFC do not have the tenure and salary protections of their article III counterparts. *See* 28 U.S.C. 171–72.

It is precisely because of their independence that we entrust article III judges with the core judicial responsibility of interpreting the Constitution and invalidating acts of Congress and the Executive. *See Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 177 (1803) (authority to declare act of Congress unconstitutional lies at heart of article III judiciary's constitutionally ordained "province and duty * * * to say what the law is").

We believe that to give the central article III power of invalidation to article I judges who do not have the independence protections runs afoul of article III's vesting clause. *See Commodity Futures Trading Comm'n* v. *Schor,* 478 U.S. 833, 847 (1986) (delegation of adjudicative functions to non-article III body must "be assessed by reference to purposes underlying the requirements of Article III"); *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line,* 485 U.S. 50 (1982) (invalidating judicial review provisions of 1978 Bankruptcy Act, which conferred article III judicial power on judges who lacked life tenure and salary protections). As Associate Attorney General Schmidt testified:

> The power of invalidation is so great and raises such fundamental questions about the structure of the federal government that it has been traditionally reserved for Article III courts. (Schmidt statement, at 25.)

We are also very concerned about the practical ramifications of this provision, as it would appear to completely foil the "preclusive review" provisions in many statutes. These are provisions which carefully specify both the time and place for any challenges to a statute's implementing regulations.[20] The idea, of course, is to get

[20] *See, e.g.,* 15 U.S.C. 2618 (exclusive jurisdiction for judicial review of regulations under Toxic Substances Control Act vested in U.S. Courts of Appeal; challenges must be filed within 60 days of promulgation of rule); 33 U.S.C. 1369(b) (certain regulations under Clean Water Act must be challenged in Courts of Appeal within 120 days of issuance; actions subject to review cannot

all interested parties together within a short period of time in one forum to air their grievances with a set of regulations—so there can be a prompt, authoritative, and final determination regarding the validity of the regulations by a court experienced in complex administrative law issues. S. 605 would give litigants the chance to circumvent this process completely—opening all federal courthouse doors to litigation over a regulation for years.

The Judicial Conference of the United States—the umbrella organization of our Nation's Federal judges, chaired by Chief Justice Rehnquist—opposes S. 605's broad expansion of jurisdiction for the Court of Federal Claims. The Conference is concerned about blurring the distinction between the CFC and the U.S. district courts:

> The proposed amendments are not merely minor extensions of existing jurisdiction of the Court of Federal Claims, but rather represent a major expansion of the jurisdiction and remedial powers of the court. There has been historically a sound working relationship between the Court of Federal Claims and the district courts that has enabled the courts to accommodate their overlapping jurisdiction. (Letter from L. Ralph Mecum, Secretary to the Conference, to Chairman Hatch, December 7, 1995.)

We should heed the Conference's studied opinion.

III. Taking Impact Statements: Paralysis by Analysis

It goes without saying that government regulators should evaluate the potential consequences of their actions on private property. But S. 605's requirement for a complicated and time-consuming takings impact analysis ("TIA") every time an agency issues even the most minor of rules or policies would do much, much more. This provision, in our view, would halt necessary regulatory changes, make oversight and enforcement prohibitively expensive, and require that our Federal laws enhance the property values of a few, at the expense of the property, health, environmental and safety values of the vast majority of American citizens.

A. TAKINGS IMPACT ANALYSES WILL BRING NECESSARY REGULATIONS TO A STANDSTILL

With limited exceptions, S. 605 requires agencies to perform elaborate takings impact analyses before issuing "any policy, regulation, proposed legislation, or related agency action" which "is likely to result in a taking of private property." Section 403(a)(1)(B). The TIA must outline the purpose of the policy or regulation; as-

---

be challenged in any civil or criminal proceeding for enforcement); 42 U.S.C. 300j–7 (certain regulations under Safe Drinking Water Act can only be challenged in District of Columbia Circuit; others only in appropriate courts of appeal; challenges must be filed within 45 days of issuance of rule; actions with respect to which review could have been obtained shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to enjoin enforcement); 42 U.S.C. 6976 (challenge to any regulation under Resource Conservation and Recovery Act must be filed in District of Columbia Circuit within 90 days of issuance; action that could have been reviewed shall not be subject to judicial review in civil or criminal proceedings for enforcement); 42 U.S.C. 7607(b) (Clean Air Act regulations must be challenged within 60 days of issuance, with review of some regulations in District of Columbia Circuit, others in appropriate court of appeals; such regulations cannot be challenged in subsequent enforcement action); 42 U.S.C. 9613(a) (regulations under Superfund must be challenged in District of Columbia Circuit within 90 days of issuance; cannot be subsequently challenged in enforcement actions).

sess whether a "taking" will occur; evaluate the likelihood that compensation will be required; itemize alternatives that would be less likely to effect a "taking"; and estimate potential liability. Section 403(a)(3). Each TIA must be submitted to OMB for review, section 403(a)(4), and no final rule could be promulgated if its enforcement "could reasonably be construed to require an uncompensated taking" of private property. Section 404(a).

Needless to say, the practical—and we believe debilitating—impact of this provision would be staggering. We underscore, at the outset, that it is not a constitutional "taking" that the bill directs agencies to assess, but a taking as newly—and very broadly—defined under S. 605. That, coupled with the requirement that a TIA be performed for even the most minor of rules or policies, will hamstring countless regulations necessary to protect our environment, health and safety. As Associate Attorney General John Schmidt testified:

> Because S. 605 establishes such a broad definition of "taking," * * * [the takings impact assessment requirements] would impose an enormous, unnecessary, and untenable paperwork burden on many aspects of government operations. This inflexible and unnecessary bureaucratic burden would apply to all kinds of government efforts to protect public safety, human health, and other aspects of the public good. The bill would severely undermine these efforts by imposing an incalculable paperwork burden. (Schmidt statement, at 27–28.)

And because the measure would invariably increase the costs of promulgating any and all regulations, regulatory *reforms*—which might ease certain burdens, or better adapt to changes in technology, business practices, or the environment—would also proceed at a snail's pace.

The provision's "decisional criteria," moreover, would prevent the final promulgation of any rule or policy which could "reasonably be construed" to effect a taking. Section 403(a). The possibilities for abuse, we believe, abound. A proposed rule, subject to challenge by an even moderately clever lawyer, could be waylaid for years—for it is almost always possible to come up with a scenario where even the most benign regulation could diminish the value of an "affected portion" of property by 33 percent. Thus, rather than litigating takings claims as they actually arise, this provision gives lawyers the go-ahead to challenge regulations in a vacuum—where they could posit countless arguments as to a rule's legal construction, and paint any number of pictures as to how it could hypothetically operate.

At bottom, we are skeptical about the very idea of evaluating takings in the abstract. As previously discussed, the question of whether the government has "taken" private property (even under this bill's new definitions) is highly fact-specific. To require agencies to answer the question before implementing a regulation or enforcing it in a real-world situation would be highly speculative. Will a regulation requiring handicapped accessible bathrooms diminish the value of some portions of some restaurants by 33 percent? How many restaurants would be affected nationwide? What would the

government's overall financial liability be? We agree with the majority of State attorneys general who wrote:

> [Takings Assessment] proposals would require agencies to speculate about the precise amount by which the value of all affected private property might be diminished, then speculate about how much diminution in value would be caused by various alternative courses of action, and then speculate about what the courts might decide in any potential lawsuit challenging the regulation. Since agency attorneys already review new proposals for potential takings problems * * * this new paper-shuffling requirement would do nothing to reduce the likelihood of unconstitutional takings. (Letter from 33 Attorneys General to Members of Congress, Sept. 26, 1994.)

Not only is such an exercise futile, in our view, it is most certainly an unwise use of our scarce regulatory resources.[21]

B. THE "LOOK BACK" PROVISION WILL REQUIRE THE GOVERNMENT TO REISSUE A MULTITUDE OF EXISTING REGULATIONS—AT THE EXPENSE OF IMPORTANT PROTECTIONS

Perhaps even more troublesome, the bill requires that all agencies review each and every regulation on their books—no matter how longstanding—and reissue any that has resulted in even a single taking anywhere in the country. Section 404(b)(1). In performing this task, the agencies are directed to "reduce such takings of private property to the maximum extent possible within existing statutory requirements." *Id.* In other words, each such reissued regulation must have one single, overriding goal: to diminish the impact of the regulation on private property—*not* to protect the public health or safety, *not* to safeguard consumers, and *not* even to maximize business opportunities.

This provision, we believe, is yet another way in which neighboring property values, the community welfare, and our Nation's environmental, health and safety protections, would be trumped by narrow private property interests under this bill. Again, Associate Attorney General Schmidt:

> By elevating property impact above all other legitimate goals and objectives, section 404 would inevitably lead to less effective implementation of many federal protections that affect property rights. (Schmidt statement, at 28.)

We note, as well, that this "look back" provision will renew the statute of limitations on each and every regulation required to be reissued. Under current law, as previously noted, the statute of limitations for challenging a newly promulgated regulation is generally short—so that all arguments can be made and evaluated within a reasonably quick time, in order that a rule passing judicial muster may take effect without undue delay.

---

[21] Indeed, both the Congressional Budget Office and the Office of Management and Budget have estimated the cost of this provision to be between $30 and $40 million over 5 years. (CBO Letter, at 2; letter from OMB Director Alice Rivlin to Chairman Hatch, Dec. 5, 1995.) It is unclear whether these estimates include the formidable costs of the bill's "look back" provision, discussed below, whereby agencies would be required to review *all* their existing regulations and reissue each one that could effect a taking.

But delay is precisely what is built into this provision—for its statute of limitations is *6 years*. Section 406. Invariably, the threat of litigation over regulations issued or reissued will cloud their enforcement for years. Again, the end result will be less protection for our environment, less protection for neighboring property owners, and less protection for the public's health, safety and general quality of life.

IV. Property Owner Bill of Rights: The Wrong Way to Challenge the Law

Title V of the S. 605 takes aim specifically at the Endangered Species Act, and the wetlands provisions of the Clean Water Act ("the Acts")—and would, in our view, seriously undermine enforcement of these provisions. Again, we reiterate the point that we have made previously: if the ESA or wetlands provisions require changes, we should do so directly, not through such backdoor measures as are contained in this title.

At the outset, the bill requires that any action to implement or enforce the Acts must comply with state and tribal laws. Section 503(a)(1). In other words, State and tribal laws would supersede Federal law—contrary to the mandate of the Supremacy Clause of the Constitution—even where the Acts themselves specifically preempt State laws. This provision would thus allow a local government to enact laws to effectively gut enforcement of endangered species and wetlands protections.

Without qualification, the bill prohibits an agency from entering property to collect information without the written consent of the owner. Section 504. We find the implications of this provision extremely troublesome. Should a property owner refuse consent, the government would be barred from responding to an environmental emergency. And because there is no law enforcement exception to the proposal, a property owner in the midst of committing an environmental crime could legally block an investigation into wrongdoing.

These provisions are made all the more indefensible, in our view, in light of existing privacy protections, such as state trespass law and the constitutional prohibition against unreasonable searches and seizures. Environmental agencies seek consent to enter land whenever feasible. But there are times—in emergencies, or when an agency suspects criminal activity—when gaining consent is not feasible or inadvisable. Agencies must not, in our view, be prevented from taking necessary action in such circumstances.

The bill moreover prohibits an agency from using data it has collected until each and every property owner has the opportunity to dispute each and every sample result. Section 505. This is the case whether or not the property owner or his property values are affected by the data. The ensuing disputes about the minutia of data collection will create a mountain of administrative litigation, and make the business of data collection extremely expensive. Finality of results will also surely be delayed, by months or even years.

Sections 506 and 507 of the bill provide for a new administrative appeals process to challenge final agency actions. We do not disagree that affected property owners should have access to a fast and inexpensive appeals process. But we point out that such reform

is already underway. The Army Corps of Engineers, for example, is currently instituting an administrative review process for wetlands determinations. We should proceed with such reforms to make the process more accessible and user-friendly.

CONCLUSION

We end where we began. Property rights are central to America's political, economic, and social vitality, and they should—indeed, must—be protected. That is why we *oppose* S. 605. For we believe that the property rights and values of Americans are *protected* by laws that make our skies clean, our water fresh, our workplaces safe, and our neighborhoods secure. We believe that S. 605 would jeopardize those rights and values—by giving property owners a near automatic right to compensation in a great many new and, in our view, often undeserving situations. It would, we believe, make it legally permissible, and perhaps even profitable, to be a bad neighbor.

We pledge our commitment to the rights of *all* property owners. Where regulations are unfair or unreasonably burdensome, we will support specific and tailored reform. But we think it unwise to take a sledge hammer to a problem that calls for a scalpel. And we cannot sanction the creation of new injustices in an effort to eradicate old ones.

Individual anecdotes of unfairness can make for good legislative drama. But they can also make for bad law. That is what we believe S. 605 would be—a bad law that would undermine the property values of the vast majority of Americans, while at the same time threatening the environmental, health, safety, welfare and civil rights protections that add value to all of our lives.

JOE BIDEN.
EDWARD M. KENNEDY.
PATRICK J. LEAHY.
PAUL SIMON.
HERB KOHL.
DIANNE FEINSTEIN.
RUSSELL D. FEINGOLD.

X. ADDITIONAL VIEWS OF SENATOR LEAHY

While concurring with the opinions expressed by Senator Biden I wish to present my additional dissenting views. The consideration of this bill has provided an opportunity to debate fundamental issues about the relationship of citizens to their communities.

John Kennedy, in the early 1960's, inspired a generation when he said, "ask not what your country can do for you—ask what you can do for your country."

Later in the same decade another—and very different motto emerged. That motto was "do your own thing." The "do your own thing" approach to life led to the drug culture. "It's my brain," they claimed, "I can do with it what I want."

These two mottoes exemplify a basic issue in our political lives. The balance between individual rights and community responsibility.

What is the balance between our rights as individuals and our responsibility to our neighbors?

Do we have a right to take any drugs we want?

Do we have a right to use our property in a way that hurts our neighbors?

There are some that today claim that anytime the community asks a person to limit the use of his property, it is somehow a "takings" under the fifth amendment.

I approach this issue without any sense of defensiveness. The Vermont State Constitution has the strongest private property protection provision of any State constitution.

In 1981 Paul Laxalt and I joined to pass a regulatory reform bill, which passed the Senate almost unanimously.

The 1990 Farm Bill reformed the wetlands provisions for farm programs so that no longer would a farmer lose all his benefits for good-faith mistakes. It gave farmers the flexibility to change farming practices.

Unfortunately, the Bush administration chose never to tell farmers about the new flexibility that the law contains.

Let us first discuss this issue in light of our Anglo- American political tradition.

Then, as a citizen of one of the most rural States in the Nation, and the senior Democrat of the Senate Agriculture Committee, let me discuss whether the new extreme views on "property rights" are consistent with American rural values.

As Americans, we share certain basic community values. One of these is stated in the simple phrase, "your freedom ends, where my nose begins." This common value is now being challenged. "Takings" bills assume that property owners have a right to use their property in a way that harms their neighbors.

This is not the American tradition. A person has never had an unfettered right to use his property in a way that hurts his neighbors.

Before the American Revolution, our community values were reflected in the "common law." The "common law" was the body of law that developed out of common community values without any legislative action. Under the common law, "nuisance" action was the legal expression of the maxim, "your freedom ends where my nose begins."

As one commentator says:

> The beauty of a simple nuisance case is that it reduces that case to terms a lay person can understand: "You dumped it, it hurt me or my property, and you should pay."

Indeed in the landmark *Lucas* case, Chief Justice Rehnquist noted that if the South Carolina law had its basis in historic nuisance law, it would not have violated the fifth amendment.

In a sense, most modern environmental, labor and safety laws grow out of the same moral assumptions which underlie nuisance actions.

The clean air laws say that a polluter cannot use his property to cause a child to get asthma.

The occupational health statutes say that an employer does not have a right to use his property in a way that injures or kills his employees.

The labor laws say that an employer does not have the right to use his property to exploit children. (Parenthetically, the opponents of child labor laws claimed they interfered with the private property of the mill owners.)

Wetland laws say that you cannot use your land to flood my land or lower the water table and dry your neighbors well.

Many of the so-called property rights bills disagree with this premise of our legal heritage. Their premise is that a citizen must be *paid* not to use his property in a way that injures his neighbor.

That many of our statutes are built on the foundation of nuisance law does not mean that common law nuisance actions can address the challenges of balancing the rights and responsibilities of 240 million Americans living thousands of miles apart on a billion acres of land.

I am sure that Midwest utilities would not want to resolve clean air issues in a nuisance action brought on behalf of a asthmatic child in a Caledonia County Vermont courtroom.

And this brings me to my second point.

Rural Americans have always understood that there must be a balance between individual rights and community responsibility. They understand that irresponsible use of private property hurts both our neighbors and our neighbors land values.

On board the Mayflower, the Pilgrims' leaders were frightened by the boasts of a few unruly passengers. They established the Mayflower Compact to protect the common good against an unruly minority.

Our Constitution was written to both "promote the *general Welfare*," and "secure the blessings of *Liberty*."

Even the wagon trains starting West routinely developed written bylaws in which, as the eminent historian Daniel Boorstin says, "there was seldom any hint or a doubt that final control on all matters rested with the majority. * * *" (*The American Experience,* at 67).

Community institutions that limit private property rights, but promote the general good of the community are common in rural America. For example, in the 19th century, milk was not a major commercial product because it carried diseases such as tuberculosis. Legal safety standards were imposed which required farmers to spend large sums upgrading their facilities to ensure milk safety. Thus, farmers' compromised their "right" to produce milk as they saw fit, to create a market that benefited most dairy farmers.

Another example is wetlands. From prerevolutionary times, farmers have joined together to form drainage districts to carry away unwanted water. To jointly drain these lands for their mutual benefit, each farmer gave up some control over his lands. Every farmer was, and still is, required to pay an assessment for maintenance of the drainage system. Drainage districts build ditches across farmer's fields against their will to benefit all farmers.

There are many other examples of how rural Americans have limited their individual rights to benefit their communities as a whole. In the West, weeds that damage grazing lands (called noxious weeds) can reduce the value of ranchers' lands. Noxious weeds cannot be successfully controlled unless they are controlled on all land in a region. Thus, many States have passed "noxious weed" laws. In States like Nebraska, if the county weed supervisor identifies a noxious weed infestation on a private land, the supervisor may order the landowner to treat the infested land. If the landowner refuses to destroy the weeds, the county destroys the weeds on the private property. Any costs incurred during the treatment are done at the expense of the landowner. The total payment includes an additional 10 percent charge of the treatment costs.

Another type of statute is found in South Carolina. Because abandoned fruit trees harbor pests, South Carolina law gives the State Crop Pest Commission power to destroy abandoned orchards if the trees are a menace to the fruit growing industry. The State then has the authority to put a lien on the property until the landowner pays for the action.

Twenty-five States have similar weed or pest control statutes granting the government power to enter the land and destroy the nuisance plants at the owner's expense: Delaware, Colorado, Florida, Iowa, Illinois, Kansas, Kentucky, Massachusetts, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, Rhode Island, South Dakota, South Carolina, Tennessee, Utah, Washington, Wisconsin, Wyoming. Nine other States: Arkansas, Indiana, Georgia, Louisiana, Maine, New Jersey, New Mexico, Virginia, West Virginia, also have similar weed or pest control statutes, but a court order is required.

Or to take an example from livestock, every State has a comprehensive statute to control animal diseases. All of these statutes give a government agent the power to prevent the movement of diseased cattle. A farmer may have to wait a month to make sure his

cattle are brucellosis free. Cattle prices routinely jump up and down 20 percent or more. Should we compensate a farmer who loses money because his sale of diseased cattle is delayed?

Of course not. We cannot protect the livestock our communities rely on if a few irresponsible landowners do not control disease in their livestock.

All these laws restrict private property rights. Yet, the benefit of protecting the community from negligent landowners outweighs the costs incurred by the individual.

Some now feel that the property rights of the individual should override the well-being of the community. This is not the American tradition and it is clearly not the tradition in rural America. If "private property rights" extremists succeed, our American values and the value of the lands on which pests and weeds cannot be controlled will be lost. Both our traditional American values and the value of rural land are at stake in this debate. Each landowner has rights, but also has responsibilities to his neighbors.

PATRICK LEAHY.

XI. ADDITIONAL VIEWS OF SENATOR FEINGOLD

At a time when we are rethinking the role of government and working to make it both more efficient and less costly, does it make sense to extend additional protections to recipients of federally subsidized water? As the author of legislation to reduce Federal spending on water subsidies, I am especially concerned with provision of S. 605 that could expand the rights of agricultural water users at considerable cost to the taxpayer.

S. 605's definition of property includes "the right to use or the right to receive water" [1] and "property rights provided by or memorialized in a contract." [2] The definition further states that property under the bill means "all property protected under the Fifth Amendment. *For this Act*." [3]

The supporters of this legislation argue that contractual rights are property rights, citing the 1934 Supreme Court holding in *Lynch* v. *United States*.[4] The question, however, isn't whether contracts for water or other commodities represent real interests in property, but rather whether this bill adds a layer of protection for contractual rights beyond that which is constitutionally guaranteed.

As the minority views make clear, understanding the full implications of S. 605 requires working through a maze of confusing and sometimes tautological definitions. At present, there is no Federal right to "receive" water except as memorialized in a contract. The Bureau of Reclamation delivers water in 17 Western States pursuant to contracts for primarily agricultural purposes. Each year, it allocates water based upon supplies available in reservoirs and other storage facilities. Most contracts generally anticipate that delivered quantities may vary on an annual basis. For example, the contract between the Bureau and the Westlands Water District in California's Central Valley states:

> There may occur at times during any year a shortage in the quantity of available for furnishing to the District through and by means of the project, but in no event shall any liability accrue against the United States or any of its officers, agents or employees for any damage, direct or indirect, arising from shortage or account of errors in operation, drought, *or any causes* * * *[5]

During the drought of 1993, the Bureau reduced the quantities of water to Westlands agricultural users. It allocated a portion of the limited water available to protect fish in accordance with the requirements of the Endangered Species Act. When agricultural

---

[1] Section 205(5)(B).
[2] Section 205(5)(D).
[3] Section 203(5), emphasis added.
[4] 292 U.S. 571 (1934).
[5] Article 11 of the contract between Westlands and the Bureau of Reclamation.

users received 50 percent of their contract quantities, Westlands sued alleging that the liability limitations of the contract were invalid and they were guaranteed a fixed quantity of water at a fixed price.[6] They contended that despite the liability limitations of the contract, the Bureau's water allocation decisions were still subject to some Agency discretion which deprived them of water and entitled them to compensation.

Last March, the Ninth Circuit Court of Appeals dismissed Westlands' claim, sustaining the Federal Government's contract defense. The failure of S. 605 to explicitly provide for a defense of compliance with contract casts doubt on its availability. Though some witnesses testified that the contract defense continues to be available, some supporters of this legislation argue that the measure is specifically needed to overturn decisions such as the Westlands case. In response to questions I submitted subsequent to the October 18, 1995, Judiciary Committee hearings on S. 605, Counselor to the Secretary of the Interior Joseph Sax wrote explicitly about the Administration's concerns with the bill's potential to create a new category of Federal water law:

> Where Congress has recently restructured federal reclamation projects to direct more economically and environmentally sensitive management, as it has done in California's Central Valley Project, * * * [a]ny steps the Department of Interior takes to implement these congressionally ratified improvements would doubtless result in demands for compensation by affected interests if these bills became law.[7]

In addition to expanding the rights of aggrieved agricultural water users to seek compensation, S. 605 also defines compensation in a way that could be extremely costly. The bill obligates the government to pay successful claimants: the fair market value of the water, rather than the subsidized price the user receives; the reduction in the market value of the land not irrigated by the water; the loss of profits attributable to the loss of water; and the fair market value of lost crops.[8]

The difference in potential compensation awards between what the users pay for the water and the subsidized price is substantial. For example, the contract price for water in California's Central Valley ranges from $3.50 to $7.50 per acre foot, while the fair market value may range from $100 to $250 per acre foot. This difference alone could amount to between $109 million and $300 million per year for each of the first 5 years if compensation is awarded.[9]

Moreover, I am concerned about the extension of water rights, in addition to the enhancement of contract protections. S. 605 also is novel in recognizing a new class of Federal rights not based on State law—interests "understood to be property based on custom

---

[6] 95 Daily Journal D.A.K. 328.

[7] Letter to Russell D. Feingold, Nov. 7, 1995. In the response Sax refers to a memorandum prepared by the Solicitor's Office of the Department of the Interior dated May 1, 1995, *Effects of S. 605 and H.R. 925 on Western Water Development.*

[8] Section 204(2).

[9] Office of the Solicitor, United States Department of the Interior, *Compensation Bills and Western Water Rights: Seven Insuperable Shortcomings.* Aug. 4, 1995, pp. 2–3.

[or] usage."[10] In the water area, extending "usage" rights could cover individuals who are illegally irrigating outside their Federal contract acres, a practice known as water spreading, or who have never held contracts to access Federal projects. Under the existing law, individuals engaged in these activities would not be entitled to compensation. However, under S. 605, the Federal Government may be liable to deliver water now obtained by custom where Federal or State law recognizes no such property right.

I do not believe that many of the supporters of this "takings" legislation fully comprehend the implications of this legislation as it relates to protecting rights to taxpayer subsidized irrigation water. As currently drafted, the water provisions, if enacted, could have an enormous, unintended cost to the taxpayers.

RUSS FEINGOLD.

[10] Section 203(5)(F).

XII. CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by S. 605, as reported, are shown as follows existing law proposed to be omitted is enclosed in brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

UNITED STATES CODE

* * * * * * *

Title 28—Judiciary and Judicial Procedure

* * * * * * *

PART IV. JURISDICTION AND VENUE

* * * * * * *

CHAPTER 91—COURT OF CLAIMS

* * * * * * *

§ 1491 Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) [The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort *The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States for monetary relief founded either upon the Constitution or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, in cases not sounding in tort, or for invalidation of any Act of Congress or any regulation of an executive department that adversely affects private property rights in violation of the fifth amendment of the United States Constitution*]. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of

the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) *In any case within its jurisdiction, the Court of Federal Claims shall have the power to grant injunctive and declaratory relief when appropriate.* To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

* * * * * * *

(4) In cases otherwise within its jurisdiction, the Court of Federal Claims shall also have supplemental jurisdiction, concurrent with the courts designated in section 1346(b) of this title, to render judgment upon any related tort claim authorized under section 2674 of this title.

(5) In proceedings within the jurisdiction of the Court of Federal Claims which constitute judicial review of agency action (rather than de novo proceedings), the provisions of section 706 of title 5 shall apply.

* * * * * * *

[§ 1500. Pendency of claims in other courts

[The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.]

* * * * * * *

FEDERAL WATER POLLUTION CONTROL ACT

* * * * * * *

PERMITS FOR DREDGED OR FILL MATERIAL

SEC. 404. (a) * * *

* * * * * * *

(u) ADMINISTRATIVE APPEALS.—

(1) The Secretary or Administrator shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an administrative appeal of the following actions under this section:

(A) A determination of regulatory jurisdiction over a particular parcel of property.

(B) The denial of a permit.

(C) The terms and conditions of a permit.

(D) The imposition of an administrative penalty.

(E) The imposition of an order requiring the private property owner to restore or otherwise alter the property.

(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the property involved in the action.

(3) An owner of private property may receive compensation, if appropriate, subject to the provisions of section 508 of the Omnibus Property Rights Act of 1995.

* * * * * * *

ENDANGERED SPECIES ACT OF 1973

* * * * * * *

COOPERATION WITH THE STATES

SEC. 6. (a) * * *

* * * * * * *

(j) Notwithstanding any other provision of this section, when the Secretary enters into a management agreement under subsection (b) with any non-Federal person that establishes restrictions on the use of property, the Secretary shall notify all private property owners or lessees of the property that is subject to the management agreement and shall provide an opportunity for each private property owner or lessee to participate in the management agreement.

* * * * * * *

PENALTIES AND ENFORCEMENT

SEC. 11. (a) * * *

* * * * * * *

(i) ADMINISTRATIVE APPEALS.—

(1) The Secretary shall, after notice and opportunity for public comment, issue rules to establish procedures to allow private property owners or their authorized representatives an opportunity for an administrative appeal of the following actions:

(A) A determination that a particular parcel of property is critical habitat of a listed species.

(B) The denial of a permit for an incidental take.

(C) The terms and conditions of an incidental take permit.

(D) The finding of jeopardy in any consultation on an agency action affecting a particular parcel of property under section 7(a)(2) or any reasonable and prudent alternative resulting from such finding.

(E) Any incidental "take" statement, and any reasonable and prudent measures included therein, issued in any consultation affecting a particular parcel of property under section 7(a)(2).

(F) The imposition of an administrative penalty.

(G) The imposition of an order prohibiting or substantially limiting the use of the property.

(2) Rules issued under paragraph (1) shall provide that any administrative appeal of an action described in paragraph (1) shall be heard and decided by an official other than the official who took the action, and shall be conducted at a location which is in the vicinity of the parcel of property involved in the action.

(3) An owner of private property may receive compensation, if appropriate, subject to the provisions of section 508 of the Omnibus Property Rights Act of 1995.

* * * * * * *

○